93-841

No. (1)

Supreme Court, U.S.
FILED
OCT 29 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

THE CITY OF NEW YORK, *et al.*,

Petitioners,

-against-

THE HERTZ CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

LEONARD J. KOERNER,*
LAWRENCE S. KAHN,
ALAN G. KRAMS,
of Counsel.

O. PETER SHERWOOD
Corporation Counsel of the
City of New York
Attorney for Petitioners
100 Church Street
New York, New York 10007
(212) 788-1031 or 1010

November 23, 1993

*Counsel of Record

94 pp

QUESTION PRESENTED

Was it error for the Court of Appeals to rule that an ordinance banning the use of a car renter's residence as a basis for imposing additional rental fees or charges is not unilateral action for purposes of section 1 of the Sherman Act where the only economic restraint is undertaken by the government in the ordinance itself and there is no authorization for private actors to make any anticompetitive decisions?

LIST OF PARTIES

Petitioners, the defendants-appellees below, are (i) The City of New York, (ii) O. Peter Sherwood, in his official capacity as Corporation Counsel of the City of New York and (iii) Mark Green, in his official capacity as Commissioner of Consumer Affairs of the City of New York.

Respondent, the plaintiff-appellant below, is The Hertz Corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 3

STATUTES INVOLVED 4

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Determination that a Municipal Ordinance Barring Discrimination on the Basis of Residence is not a Unilateral Act of the City of New York and is Subject to a Rule-of-Reason Analysis Under the Sherman Act Conflicts with This Court's Decision in *Fisher v. City of Berkeley* and with the Decisions of Other Circuit Courts of Appeals and State Courts that Have Applied *Fisher* to Local Legislation 14

II. The Ruling of the Court of Appeals Merits Review Because it Threatens the Power of Local Governments to Act in the Public Interest Through Unilateral Regulatory Legislation that has Economic Effects. 24

CONCLUSION 27

Appendix

Opinion of the U.S. Court of Appeals for the Second Circuit Sought to be Reviewed, Dated August 2, 1993 . . . . . A1

Memorandum and Order of the U.S. District Court, Dated March 31, 1992 . . . . . A25

Oral Opinion of the U.S. District Court, Rendered March 31, 1992 . . . . . A27

Opinion of the U.S. Court of Appeals for the Second Circuit, Dated June 10, 1992 . . . . . A30

Opinion of the New York State Court of Appeals, Dated December 22, 1992 . . . . . A37

N.Y.C. Local Law, Int. No. 71-A A43

Verified Complaint A45

TABLE OF AUTHORITIES

Page

Cases:

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 12, 16, 18, 21

City of Columbia v. Omni Outdoor Advertising, Inc., 111 S.Ct. 1344 (1991) 23

Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) 23, 26

Englert v. City of McKeesport, 872 F.2d 1144 (3d Cir.), *cert. denied*, 493 U.S. 851 (1989) 19

Federal Trade Commission v. Ticor Title Ins. Co., 112 S.Ct. 2169 (1992) 17

Fisher v. City of Berkeley, 475 U.S. 260 (1986) . passim

Hertz Corp. v. City of New York, 607 N.E.2d 784 (N.Y. 1992) 4

Lochner v. New York, 198 U.S. 45 (1905) 25

Miller v. Hedlund, 813 F.2d 1344 (9th Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988) 19, 20

Municipal Utilities Bd. of Albertville v. Alabama Power Co., 934 F.2d 1493 (11th Cir. 1991) 17, 18

Penn v. City of San Diego, 233 Cal. Rptr. 514 (Ct. App. 1987) 18, 20

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) 16, 17, 18, 21

Schwegmann Giant Super Markets v. Edwards, 552 So. 2d 1241 (La. App. 1989), *writ denied*, 556 So. 2d 1280 (La.), *cert. denied*, 496 U.S. 938 (1990) 18, 20

324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) 17

Traffic Jam & Snug, Inc. v. Michigan Liquor Control Commission, 716 F. Supp. 1024 (E.D. Mich. 1989), *aff'd*, 899 F.2d 15 (6th Cir. 1990) 19

Vatore v. Commissioner of Consumer Affairs, Mo. No. 851 (N.Y. Ct. App. Oct. 21, 1993) 25

Statutes and Court Rules:

15 U.S.C. § 1 (Supp IV 1992) . . . . . passim

N.Y.C. Admin. Code § 17-177 25

N.Y.C. Local Law, Int. No. 71-A, § 1, I-A Proceedings of the Council of the City of New York 838 (1992) . passim

Sup. Ct. R. 10.1(a) 14

Sup. Ct. R. 10.1(c) 14

Miscellaneous:

Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, § 209.1c (Supp. 1991) 20

Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L. J. 486 (1987) 21

Daniel J. Gifford, *The Antitrust State-Action Doctrine After Fisher v. Berkeley*, 39 Vand. L. Rev. 1257 (1986) . . . 20

II Earl W. Kinter, *Federal Antitrust Law*, § 9.16A (Supp. 1993) 20

I-A Proceedings of the Council of the City of New York 835-37 (1992) 6

I-A Proceedings of the Council of the City of New York 1013 (1992) 7

I-A Proceedings of the Council of the City of New York 1159 (1992) 7

2 Julian O. von Kalinowski, *Antitrust Laws and Trade Regulation*, § 6.01(2)(a) (1993) 20

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

THE CITY OF NEW YORK, *et al.*,

Petitioners,

-against-

THE HERTZ CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioners, the City of New York and two of its officials, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on August 2, 1993, which (i) reversed the judgment of the United States District Court for the Southern District of New York (Knapp, D.J.), dismissing plaintiff's complaint for failure to state a claim, and (ii) remanded the case for further proceedings.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit that was issued with the judgment sought to be reviewed is reported at 1 F.3d 121, and is reprinted in the appendix hereto, *infra* at A1.

The memorandum and order of the United States District Court for the Southern District of New York (Knapp, D.J.) dismissing the complaint is not reported. It is reprinted in the appendix hereto, *infra* at A25.

The opinion of the United States District Court for the Southern District of New York (Knapp, D.J.) upon which the aforementioned memorandum and order is based was rendered orally, on the record. The portion of the transcript containing this opinion is reprinted in the appendix hereto, *infra* at A27.

An earlier opinion of the United States Court of Appeals for the Second Circuit certifying a question of state law to the New York State Court of Appeals pursuant to N.Y. Comp. Codes R. & Regs. tit. 22, § 500.17(a) is reported at 967 F.2d 54, and is reprinted in the appendix hereto, *infra* at A30.

The opinion of the New York State Court of Appeals addressing the question of state law certified to it is reported at 80 N.Y.2d 565, 607 N.E.2d 784, 592 N.Y.S.2d 637, and is reprinted in the appendix hereto, *infra* at A37.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§ 1131, 1332, 1337, and 1343, plaintiff brought this suit in the United States District Court for the Southern District of New York. On March 31, 1992, the District Court dismissed the complaint for failure to state a claim (A27).[1]

Respondent appealed, and on August 2, 1993, the United States Court of Appeals for the Second Circuit ruled that the complaint stated a cause of action under section 1 of the Sherman Act, 15 U.S.C. § 1, and remanded the case for further proceedings consistent with its opinion (A1).

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

---

[1]Numbers in parentheses preceded by an "A" refer to pages in the appendix hereto.

STATUTES INVOLVED

N.Y.C. Local Law, Int. No. 71-A, § 1, I-A Proceedings of the Council of the City of New York 838 (1992) (to be codified at N.Y.C. Admin. Code § 20-696)[2]

> Discriminatory practices prohibited. No rental vehicle company shall refuse to rent a motor vehicle to any person otherwise qualified based on that person's residence, nor impose fees or charges based on that person's residence.

15 U.S.C. § 1 (Supp. IV 1992)

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

---

[2]The complete ordinance is reprinted in the appendix at A43.

The opinion of the Court of Appeals refers to this ordinance as Local Law No. 21, the designation it would have received had it proceeded in the normal course. However, this ordinance was not numbered because petitioners were enjoined from filing it, and an unrelated piece of local legislation received the designation Local Law No. 21 (1992). *See Hertz Corp. v. City of New York*, 607 N.E.2d 784, 785 n. (N.Y. 1992); Dist. Ct. Memorandum and Order (Mar. 31, 1992) at A26. In this petition, the ordinance will be cited as "Int. No. 71-A."

STATEMENT OF THE CASE

This petition asks this Court to review whether section 1 of the Sherman Act, 15 U.S.C. § 1, is violated by a local ordinance that simply directs rental car companies not to use a renter's residence as a basis for setting rates. The ordinance was a response to Hertz's January 1992 promulgation of a rate schedule with varied additional rental charges for "persons residing in the Bronx, Brooklyn, Manhattan and Queens, whenever they rent a car at an outlet in the New York metropolitan area, New Jersey, Southern Connecticut or Eastern Pennsylvania" (JA43, A49).[3] The additional charge varied according to the renter's borough of residence, amounting to $56 per day for Bronx residents, $34 for Brooklyn, $15 for Queens, and $3 for Manhattan (A49). The surcharges were not applied to employees of certain corporations that contract for a corporate rate from plaintiff or to members of plaintiff's "Manhattan Preferred Renters Club" and "Hertz Gold Club" (A49-A50).

According to Hertz's complaint, 7% of its rentals are in its New York Region, but 25% of its liability losses occur there, causing plaintiff to lose money on its New York Region operations (A49). Plaintiff claims that these surcharges "were established solely for the purpose of apportioning [excessive liability losses] to those groups that were responsible for them" (A48-A49).

When compared to Hertz's per diem rental revenues, the additional charges are substantial, sometimes exceeding or approaching the base rental charge itself. The residence

---

[3]Numbers in parentheses preceded by a "JA" refer to pages in the Joint Appendix submitted to the Court of Appeals.

surcharge amounts to 119.6% of the per diem rental fee for Bronx residents, 74% for Brooklyn renters, 33.2% for Queens, and 5.9% for Manhattan residents (JA336). Plaintiff's own data shows that renters residing in the most heavily surcharged boroughs (Bronx, Brooklyn and Queens) account for less than 10% of Hertz's revenue from its New York Region for 1988-1990, so that any additional liability costs associated with those rentals could be spread over all New York Region rentals by increasing rates $3.29 per day (JA336).

In January 1992, the New York City Council's Committee on Consumer Affairs began considering a legislative response to plaintiff's rates, conducting hearings and consulting with car rental companies and others (JA292-JA293). The Committee reported out Int. No. 71-A, prohibiting rental car rates based on residence. *See* I-A Proceedings of the Council of the City of New York 835-37 (1992).

The full City Council considered the matter on March 12, 1992. Supporters of Int. No. 71-A voiced concern over the fact that the residence-based rates adversely affected "the poor and working poor" (JA65). A statement by Council Member Watkins explained:

> There are those who say we live in a fractured city where groups are pitted against groups, areas against areas, neighborhoods against neighborhoods. This Council must do all in its power to prevent that happening and reverse it where it has happened.

> The actions of the Hertz Corporation which now impose a surcharge on local renters of cars from The Bronx, Queens and Brooklyn are divisive and wrong. . . .
>
> What Int. No. 71-A does is prohibit discrimination with respect to the selling of a service, namely the rental of cars. It is not the intent of this legislation to regulate prices and it does not do so.

I-A Proceedings of the Council of the City of New York 1159, 1159 (1992).

During floor debate, Council Member Alter, one of the bill's three co-sponsors, said that while it is normal and expected that businesses will charge more or less in different areas based on their costs, it is "discriminatory" to assess a charge based on the buyer's residence, regardless of where the transaction occurs (JA214). Another Council member analogized it to a restaurant having different prices depending on the customer's residence (JA186-JA187). Co-sponsor Eisland observed that plaintiff's surcharge for Bronx residents is more than the basic rate for renting a car and, if residence-based prices are allowed, other companies could do the same thing and "it would price many people out of being able to rent a car" (JA225). Council Member Maloney said that the "[s]urcharges discriminate against people with good driving records just because they happen to live at the wrong address" (JA239). Int. No. 71-A was enacted on March 12, 1992 by a vote of 35-14. I-A Proceedings of the Council of the City of New York 1013 (1992).

Proceedings Below

Two weeks later, plaintiff filed the instant action, citing 28 U.S.C. §§ 1131, 1332, 1337, and 1343 as furnishing federal jurisdiction for its various claims (A46). The complaint contains six counts claiming that Int. No. 71-A violates plaintiff's rights under the Constitution, including one count alleging that the ordinance is preempted by the Supremacy Clause because it "mandates a *per se* violation of Section 1 of the Sherman Act" by creating an "[arrangement] that [interferes] with the setting of prices by free market forces" (A52). Plaintiff also claimed that Int. No. 71-A violated the New York State Constitution because the State Legislature had preempted the field of regulation of the rental car industry (A57).

Plaintiff moved for a preliminary injunction and temporary restraining order enjoining enforcement of the statute (JA22-JA24). Petitioners opposed the application, and the District Court advised the parties that it would treat petitioners' submission as a motion to dismiss (Pltf. Br. to Ct. App. at 23 n. 11). At oral argument in the District Court, the parties agreed that there were "no facts in dispute" requiring a trial (JA542, JA543). The District Judge said that "substantial" questions were raised only by plaintiff's antitrust and state preemption theories (JA611).

After oral argument, the District Court announced a decision dismissing the complaint, but the Court stayed implementation of the local law "pending the outcome of [an expedited] appeal or until the Court of Appeals shall have modified or vacated this order" (A26).

On the antitrust issue that is the basis of this petition, the District Court agreed with petitioners that Int. No. 71-A was unilateral action not proscribed by section 1 of the Sherman Act rather than a prohibited hybrid restraint, as plaintiff claimed (A27). The District Judge said: "It seems to me what the [Supreme] Court means when it says hybrid is some kind of governmental scheme which, one way or another, allows private people to manipulate prices. That is maybe not the accurate description, but that is in general what it seems to me hybrid means" (A27).

Plaintiff appealed, and the Court of Appeals certified the state-law preemption question to the New York State Court of Appeals, which ruled in December 1992 that New York City was not preempted by state legislation from enacting Int. No. 71-A (A30, A37). On August 2, 1993, the federal Court of Appeals issued the decision that is the subject of this petition, holding that the complaint stated a claim under section 1 of the Sherman Act and remanding the case to the District Court for further proceedings (A1).

The Opinion of the Court of Appeals

The Court said that "by controlling one aspect of the pricing process for rental cars, the Hertz law on its face restrained trade within the meaning of § 1 of the Sherman Act" (A6). Turning to petitioners' contention that there was no concerted action, the Court of Appeals analyzed this Court's decision in *Fisher v. City of Berkeley*, 475 U.S. 260 (1986), which held that Berkeley's rent control ordinance was unilateral action outside the purview of section 1 of the Sherman Act. Discussing the distinction made in *Fisher* between unilateral governmental action and hybrid restraints found violative of section 1 by this Court in two earlier cases

discussed in *Fisher*,[4] the Court of Appeals said that "[t]he *Fisher* Court explained that the factor distinguishing *Midcal* and *Schwegmann Bros.* was the role played by the governmental body in implementing the legislation. In both cases, the state had dictated price-setting that was to be performed not by the state, but by wholesalers and producers in the liquor industry" (A9).

Although the Court did not find any similar governmental authorization for private anticompetitive conduct in Int. No. 71-A, it said that Int. No. 71-A differed from Berkeley's rent control ordinance for several reasons (A10):

> First, the law is not a 'pure regulatory scheme', *Fisher*, 475 U.S. at 269, because it is not a 'scheme' at all; the law is simply a directive for all rental-car companies doing business in New York City to remove one factor from their competitive-pricing structures. Second, the law lacks the independent, quasi-judicial board that in *Berkeley* could adjust rates and provide relief in individual circumstances. Finally, the City of Berkeley was operating in an area vital to its municipal authority -- housing; less vital is the rental-car industry in New York City.

---

[4]The two cases used as illustrations in *Fisher* were *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) and *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). *See Fisher*, 475 U.S. at 267-69.

The Court also said that Int. No. 71-A did not "easily fit the fact pattern of the cases held to involve 'hybrid' restraints -- those that restrain trade through some combination of governmental and private conduct" because Int. No. 71-A "does not purport to authorize price-setting by private industry; it simply eliminates an element of price competition among industry members" (A10-A11).

Notwithstanding this reiteration that the challenged ordinance did not authorize private anticompetitive conduct, the Court of Appeals said it would not:

> apply *Fisher* expansively so as to view [Int. No. 71-A] as a unilateral action that lacks the degree of private-governmental agreement required to be a contract, combination, or conspiracy in restraint of trade. To do so would remove from the reach of the antitrust laws all local governmental actions not fitting the precise fact pattern of the liquor cases, and would preclude examination of their anticompetitive effects (A11).

The Court said there were "anticompetitive risks" in Int. No. 71-A that warranted antitrust scrutiny, including the possibility that the law could cause companies to incur additional costs "that will have an extraterritorial impact" or could "obstruct regional efficiency and trigger economic Balkanization" if other localities passed similar legislation (A11).

Finding the law "closer to, although not identical with, those actions categorized as 'hybrid', because it removes one element of competition in car-rental pricing, but does not further regulate or review the prices set by rental companies," the Court said that Int. No. 71-A "merits hybrid treatment" because it "calls for anticompetitive private conduct in setting rental rates and making rental decisions" (A11-A12). Accordingly, it overturned the District Court's dismissal of plaintiff's antitrust claim (A12).

Although not argued by petitioners, the Court also discussed whether the ordinance was within the ambit of "state action immunity" from the Sherman Act, concluding that the immunity did not apply (A12-A15).[5]

The Court then held that the ordinance was not invalid *per se* under section 1 of the Sherman Act, but rather subject to rule-of-reason analysis (A15-A17). Even though plaintiff's complaint pleaded only that Int. No. 71-A constitutes a *per se* violation of section 1 of the Sherman Act and is therefore preempted under the Constitution's Supremacy Clause, the Court of Appeals remanded the matter to the District Court to consider the ordinance under rule-of-reason criteria (A17-A20).

Explicitly recognizing that such analysis was entirely novel in cases involving municipal action, the Court said the rule "will require considerable tailoring to achieve even an approximate fit" (A18). The Court of Appeals instructed the District Court to "balance the city's articulated justifications

---

[5]The phrase "state action immunity" summarizes the principle that certain anticompetitive conduct authorized by state governments is not actionable under the Sherman Act. *See Midcal*, 445 U.S. at 103-105.

for promulgating the anticompetitive regulation against the antitrust harm caused by the regulation" (A18). Thus, the District Court is to balance "the city's articulated concern of avoiding nondiscrimination by ensuring that Hertz's pricing and rental decisions do not burden minorities and the working poor" (A19), against plaintiff's "explanation for its price increase -- specifically, its claim to have experienced exceedingly high liability losses in certain boroughs" (A20).

The Court affirmed the District Court's dismissal of plaintiff's other causes of action (A20-A24). With regard to the claim that Int. No. 71-A violates the Commerce Clause, the Court disagreed with plaintiff's argument that the ordinance was facially discriminatory against interstate commerce and held that the complaint did not state a valid claim under the Commerce Clause since it did not adequately allege "a discriminatory impact on interstate commerce" (A21). However, the Court said that plaintiff could "develop further its contentions with respect to the law's impact on interstate commerce" since the case would be remanded to the District Court in any event for consideration of plaintiff's antitrust claim (A22).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Determination that a Municipal Ordinance Barring Discrimination on the Basis of Residence is not a Unilateral Act of the City of New York and is Subject to a Rule-of-Reason Analysis Under the Sherman Act Conflicts with This Court's Decision in *Fisher v. City of Berkeley* and with the Decisions of Other Circuit Courts of Appeals and State Courts that Have Applied *Fisher* to Local Legislation

This petition should be granted because the Court of Appeals' failure to dismiss plaintiff's antitrust claim is totally inconsistent with this Court's decision in *Fisher v. City of Berkeley*, 475 U.S. 260 (1986). *See* Sup. Ct. R. 10.1(c). Int. No. 71-A is not a "hybrid" statute within the meaning of *Fisher* because it does not authorize discretionary anticompetitive conduct by private parties; it merely forbids using an automobile renter's residence as a basis for charging additional rental fees and thus qualifies as unilateral action beyond the scope of section 1 of the Sherman Act. The Court of Appeals' error also merits review because it conflicts with the reading of *Fisher* by other courts of appeals and state courts. *See* Sup. Ct. R. 10.1(a). By ruling as it did, the Court of Appeals expanded section 1's applicability to municipal legislation well beyond the bounds defined by this Court in *Fisher*, infringing on the ability of local legislative bodies to issue unilateral directives that might have

economic impact, and thereby seriously undermining the police powers of municipalities.

In *Fisher,* comprehensive, locally imposed rent controls were upheld against an antitrust challenge by landlords because the economic restraint was "unilaterally imposed by government upon landlords to the exclusion of private control," 475 U.S. at 266, and thus did not constitute a "contract, . . . combination . . . or conspiracy in restraint of trade" within the meaning of section 1 of the Sherman Act. 15 U.S.C. § 1 (Supp IV 1992). Even where such governmental restraints "have the same economic effect as concerted action might have, there can be no liability under § 1 in the absence of agreement." 475 U.S. at 266 (citations omitted). Responding to the argument that there was concerted action because of the landlords' activities pursuant to the rent control law, this Court said:

> A restraint imposed unilaterally by government does not become concerted action within the meaning of [§ 1 of the Sherman Act] simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy.

475 U.S. at 267.

Fisher distinguished obligatory compliance with unilateral governmental directives from instances where government bestows on private parties the legal authority to exercise

discretion in an anticompetitive fashion. Calling the latter "'hybrid'" restraints, 475 U.S. at 268, this Court said that such governmental acts are within the purview of section 1 of the Sherman Act because they create a scheme in which "nonmarket mechanisms merely enforce private marketing decisions. . . . Where private actors are thus granted 'a degree of private regulatory power,' . . . the regulatory scheme may be attacked under § 1." 475 U.S. at 268 (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 666 n. 1 [1982]) (citation omitted)." *Id.* (citation omitted).

As examples of impermissible hybrid restraints, *Fisher* cited *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) and *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). *See* 475 U.S. at 268. In *Schwegmann*, this Court ruled that a Louisiana statute could not authorize a distributor to enforce minimum retail prices set in a vertical price-fixing agreement against retailers who had not signed the agreement.[6] *Fisher* explained that the Louisiana statute was a hybrid restraint, not unilateral action, because "both the selection of minimum price levels and the exclusive power to enforce those levels were left to the discretion of distributors." 475 U.S. at 268.

In *Midcal*, this Court struck down a California statute that required retailers to sell at a price fixed in either contractual arrangements with a wholesaler or, in the absence of a contract, in a price schedule filed by the wholesaler. *See Fisher*, 475 U.S. at 268-69; *Midcal*, 445 U.S. at 97. Like the private price fixing held impermissible in *Schwegmann*,

---

[6]When *Schwegmann* was decided, the price-fixing agreements themselves were authorized by the since-repealed Miller-Tydings Act. *See Fisher*, 475 U.S. at 268.

this was an impermissible hybrid restraint of trade because it "entailed a similar degree of free participation by private economic actors" in the government-created price maintenance scheme. *Fisher*, 475 U.S. at 268. In contrast, the Berkeley rent control ordinance upheld in *Fisher* was unilateral governmental action because the anticompetitive conduct it authorized, also price maintenance, was under the complete control of the government. *See* 475 U.S. at 269.

In post-*Fisher* decisions, this Court reiterated that the line between unilateral conduct and impermissible hybrid restraints is crossed at the point government authorizes private parties to make their own anticompetitive decisions rather than simply requiring their obedience to governmental commands. *See 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344-345 & n. 8 (1987); *Federal Trade Commission v. Ticor Title Ins. Co.*, 112 S.Ct. 2169, 2180 (1992) (describing *Fisher* as "a case in which governmental actors made unilateral decisions without participation by private actors").

Other courts and commentators have understood that this is the pivotal distinction made by *Fisher*. In *Municipal Utilities Bd. of Albertville v. Alabama Power Co.*, 934 F.2d 1493 (11th Cir. 1991), the Court of Appeals for the Eleventh Circuit said:

> [T]he Supreme Court has focused its inquiry upon whether private parties or public authorities made the operative decisions regarding the challenged anticompetitive conduct. The Court has consistently held that state statutes which grant private actors "'a degree of private regulatory power'" violate

> the Sherman Act and do not qualify for state action immunity.

934 F.2d at 1503 (citation omitted) (quoting *Fisher*, 475 U.S. at 268). The Court observed that, in *Fisher*, this Court "held that, because the rent ceilings were imposed by the city and not by private parties, the restraint was not concerted action within the meaning of the Sherman Act." *Id.* at 1504 (citation omitted). Accordingly, the Alabama statute was upheld because, "[l]ike *Fisher* . . . government officials, not private actors, made the operative decisions" regarding the anticompetitive conduct [division of territories] authorized by the legislation. *Id.* (citations omitted).

In *Schwegmann Giant Super Markets v. Edwards*, 552 So. 2d 1241 (La. App. 1989), *writ denied*, 556 So. 2d 1280 (La.), *cert. denied*, 496 U.S. 938 (1990), the Court upheld legislation prohibiting wholesale beer transactions on credit because "[n]o private economic actor is granted any degree of private regulatory power." 552 So. 2d at 1245 (citation to *Fisher* omitted). The decision explained that, unlike the hybrid restraint at issue in *Midcal*, where producers could "prevent price competition by dictating the prices charged by the wholesalers," here, "the breweries have no power to dictate that beer sales shall be for cash or credit. . . . Such determination is solely state action." *Id.*;[7] *see also Penn v.*

---

[7] *Alabama Power* and *Edwards* involve state legislation and state action immunity but are nonetheless pertinent here because they both rely on *Fisher*'s analysis of the distinction between impermissible hybrid restraints and anticompetitive conduct unilaterally directed by government. The relevance of state action immunity cases in making this analysis is made manifest by *Fisher* itself, where this Court used two such cases, *Midcal* and *Schwegmann*, to explain the hybrid/unilateral distinction. As *Fisher* (continued...)

City of San Diego, 233 Cal. Rptr. 514, 517 n. 3 (Ct. App. 1987) (antitrust claim against ordinance setting maximum price for customer's use of playing card room withdrawn in light of *Fisher*); *cf. Traffic Jam & Snug, Inc. v. Michigan Liquor Control Commission*, 716 F. Supp. 1024, 1026 (E.D. Mich. 1989), *aff'd*, 899 F.2d 15 (6th Cir. 1990) (upholding statute prohibiting person from holding both brewer's and retailer's beer license -- "no private action in the alleged anticompetitive action involved").

In *Englert v. City of McKeesport*, 872 F.2d 1144 (3d Cir.), *cert. denied*, 493 U.S. 851 (1989), the Court of Appeals for the Third Circuit rejected a Sherman Act challenge to local legislation making a particular electrical inspection agency the only one whose inspections could be used for municipal certification of code compliance. The plaintiff claimed that concerted action arose from the designated agency's use of its status for economic advantage, but the Court said that "a restraint established through unilateral action by the government is not transformed into concerted action merely because the government enforces it." 872 F.2d at 1150.

Miller v. Hedlund, 813 F.2d 1344 (9th Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988) illustrates a hybrid restraint invalid under *Fisher*'s principles. State regulations restrained price competition by requiring price changes to be posted ten

---

[7](...continued)
made clear, a hybrid restraint that gives private actors the authority to make their own anticompetitive decisions violates section 1 of the Sherman Act whether it is enacted by a state or local government.

Petitioners did not argue state action immunity here because Int. No. 71-A flows from the City's home rule powers, not from any state legislation authorizing local regulation of the rental car industry.

days in advance of their effective date, prohibiting bulk discounts, and requiring price reductions to remain in effect for extended periods of time. *See* 813 F.2d at 1347. The state claimed that the Sherman Act was not implicated because the wholesalers were simply obeying unilaterally imposed directives, but the Court ruled otherwise, holding that because the state scheme "allows private parties to set the prices," it was not like "the purely public restraint of Berkeley's regulatory scheme which removed the power to set rents from the landlords." 813 F.2d at 1351.

Miller's analysis is consistent with the reasoning in the other authorities cited above. In *Miller*, the state went well beyond unilateral price fixing (the economic restraint in *Fisher*) or setting one term of sale (the restraint in *Edwards* and *Penn*). The state created an elaborate anticompetitive price maintenance structure and then let private actors use this anticompetitive framework to fix their own prices.

Commentators have also noted that, under *Fisher*, impermissible hybrid restraints are those that "involve schemes in which legislation effectively empowers private parties to make decisions that then are enforced by governmental apparatus." Daniel J. Gifford, *The Antitrust State-Action Doctrine After Fisher v. Berkeley*, 39 Vand. L. Rev. 1257, 1280 (1986); *see also* Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, § 209.1c at 101, 100-101 (Supp. 1991) (hybrid restraint is one "creating unsupervised private power in derogation of competition"); II Earl W. Kinter, *Federal Antitrust Law*, § 9.16A (Supp. 1993) ("[t]he [*Fisher* decision] recognized that certain 'hybrid' situations might occur, in which the nonmarket mechanisms imposed by governmental action merely enforce private marketing decisions" [footnote omitted]); 2 Julian O.

von Kalinowski, *Antitrust Laws and Trade Regulation*, § 6.01(2)(a) & n. 14 (1993).

Thus, as one scholar's hypothetical pointed out, if the Berkeley rent control ordinance had allowed a landlord to set a rent that other landlords would have been required to obey, the ordinance would have failed as a hybrid restraint because of "government's effort to delegate to private parties the power to restrain competition." Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L. J. 486, 505 (1987).

Applying these principles here, the Court of Appeals should have dismissed plaintiff's antitrust claim. The only economic restraint created by Int. No. 71-A is the directive that a renter's residence cannot be used to set prices. Private companies must conform their conduct to the law, but they have not been given any authority to make their own anticompetitive decisions.

Nonetheless, the Court of Appeals erroneously found that the City's ordinance was akin to a hybrid restraint, even while acknowledging both (i) that Int. No. 71-A does not authorize private parties to exercise business discretion in an anticompetitive fashion and (ii) that this absence of empowerment of private actors is the critical factor in making the unilateral/hybrid distinction.. *See* slip op. at A10 (Int. No. 71-A "is simply a directive for all rental-car companies doing business in New York City to remove one factor from their competitive-pricing structure"); A9 (*Midcal* and *Schwegmann* did not involve unilateral action because "the state had dictated price-setting that was to be performed not by the state, but by wholesalers and producers"). The Court concluded that Int. No. 71-A "calls for anticompetitive

private conduct in setting rental rates," but ignored the legally dispositive fact that this conduct is simply ministerial obedience to a unilateral municipal directive and not the authority to make discretionary anticompetitive decisions (A12).

In reaching this erroneous conclusion, the Court of Appeals relied on factors that simply are not germane under *Fisher*. Distinguishing Int. No. 71-A from the Berkeley ordinance, the Court said that Int. No. 71-A did not create a comprehensive regulatory scheme, did not have a quasi-judicial body to "adjust rates and provide relief in individual circumstances" and did not address a subject "vital to [New York City's] municipal authority." Slip op. at A10.

The level of comprehensiveness in the Berkeley ordinance was critical to the determination in *Fisher* because the Berkeley ordinance had a far broader objective than Int. No. 71-A: Berkeley created comprehensive price regulation for most rental housing within its boundaries. The complex scheme and quasi-judicial board were important to the unilateral/hybrid analysis because they insured that the anticompetitive conduct, ongoing price fixing, was performed by government, not private parties.

On the other hand, Int. No. 71-A has a very limited objective: precluding rental car pricing based on the renter's residence. This single goal can be accomplished with a simple directive; an elaborate bureaucracy is not needed to insure that anticompetitive conduct is the action of government and not of private parties delegated authority by government.

The other factor relied on by the Court of Appeals, the importance of the interest being regulated, *see* slip op. at A10, is not given any weight in *Fisher*, and its use by the Court of Appeals raises the disquieting prospect that "[o]nce again, the federal courts will be called upon to engage in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that this Court has properly rejected." *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 67 (1982) (Rehnquist, J., dissenting); *see also City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S.Ct. 1344, 1352 (1991). Indeed, that kind of inquiry is precisely what the Court of Appeals contemplates here. *See infra* at 25-26.

The Court of Appeals mistakenly criticized petitioners as reading *Fisher* "expansively," in a way that "would remove from the reach of the antitrust laws all local governmental actions not fitting the precise fact pattern of the liquor cases, and would preclude examination of their anticompetitive effects." Slip op. at A11. This greatly exaggerates petitioners' position. Any local legislation that authorizes private actors to make anticompetitive decisions, rather than merely follow government directions, would fail *Fisher*'s test for unilateral action, whether it be authorization to fix prices, as in the liquor cases, or a multitude of other restraints of trade, such as allowing private actors to create market territories. Section 1 of the Sherman Act continues to have a role in analyzing municipal legislation, but, as explained by this Court, only when the legislation involves concerted activity, not when government enacts unilateral regulations.

II. The Ruling of the Court of Appeals Merits Review Because it Threatens the Power of Local Governments to Act in the Public Interest Through Unilateral Regulatory Legislation that has Economic Effects.

The Court of Appeals' misreading of *Fisher* merits this Court's attention because it significantly erodes the ability of localities to use their home rule powers to protect their citizens by enacting unilateral directives that affect the conduct of business within their boundaries. This burden falls particularly hard on large municipalities. As a local government serving millions of people, New York City must be able to address local problems without seeking specific authorization from the State Legislature, where the City's concerns must compete for attention with statewide problems and the needs of other localities and regions in the state.

By using borough of residence as a basis for charging widely disparate rates to two otherwise identical New Yorkers renting the same car and taking it to the same place, plaintiff touched a raw nerve in a City always struggling against efforts to divide its citizens along racial, ethnic, religious, or geographic lines. Plaintiff's policy is especially offensive because the highest surcharges fall on the boroughs with the highest proportion of poor and minority residents. The City's legislative body decided to address this uniquely local problem and did so with limited legislation aimed directly at the offensive practice. Local governments must be able to respond to such concerns without facing costly and complex antitrust litigation.

The Court of Appeals' ruling has adverse effects going well beyond the specific ordinance at issue here. As this Court observed in *Fisher*, "the function of government may often be to tamper with free markets, correcting their failures and aiding their victims . . . ." 475 U.S. at 264 (citation omitted). Regulations with economic impact may be enacted to address a broad array of public health, social, or economic concerns. For example, in order to make cigarette vending machines inaccessible to minors, New York City has used its home rule powers to ban their use, except in taverns. *See* N.Y.C. Admin. Code § 17-177.[8] A store precluded from having a cigarette machine may well lose money from sales and may purchase fewer tobacco products as a result. Municipal directives concerning licensing, deceptive advertising, product safety, employee working conditions, etc. may all affect the discretion of private businesses and have some economic impact.

The Court of Appeals' ruling will tempt creative litigators to turn every such ordinance or regulation into a complex antitrust suit, even though the local action is nothing more than a unilateral instruction to private business. The resulting trials will put federal courts back into the era epitomized by *Lochner v. New York*, 198 U.S. 45, 56-60 (1905), when courts replaced local legislative judgments with judicial determinations regarding the wisdom of, and need for, remedial legislation. The Court of Appeals made this

---

[8]While not relevant to the point for which it is mentioned here, this Court should be aware that New York's highest court has just agreed to determine whether this ordinance is a valid exercise of the City's home rule authority or regulates in a field preempted by the state. *See*, Order, *Vatore v. Commissioner of Consumer Affairs*, Mo. No. 851 (N.Y. Ct. App. Oct. 21, 1993).

explicit in its description of the novel proceedings to take place here on remand to the District Court (A18). The District Court must "balance the city's articulated justifications for promulgating the anticompetitive regulation against the antitrust harm caused by the regulation" (A18) (citations omitted). This will include somehow weighing Hertz's claims of adverse economic impact against "the evil to be prevented," namely "the city's articulated concern of avoiding nondiscrimination by ensuring that Hertz's pricing and rental decisions do not burden minorities and the working poor" (A19) (citation omitted). To follow these instructions, the District Court will have to second-guess the New York City Council's assessment of local conditions and decide how to measure what the Court of Appeals called "noneconomic federal values embodied in the thirteenth and fourteenth amendments as well as in many of the federal statutes" when these concerns are placed against Hertz's claims of economic harm and unreasonable restraint of trade (A19). This is precisely the type of "wide-ranging, essentially standardless inquiry" into the wisdom of local legislation that this Court has previously disavowed. *Community Communications Co.*, 455 U.S. at 67 (Rehnquist, J., dissenting).

By muddying the clear distinction made in *Fisher* between (i) unilateral government restraints on trade and (ii) government authorization to private actors to make their own decisions in restraint of trade, the Court of Appeals has cast a shadow on local efforts to regulate business conduct. This is not the result intended by this Court in *Fisher*, which recognized that unilateral local directives regulating business because of local health, economic, or social concerns are not the proper subject of rule of reason analysis under section 1

of the Sherman Act, and the Court of Appeals' determination should be reviewed by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

O. PETER SHERWOOD,
Corporation Counsel of the
City of New York,
Attorney for Petitioners.

LEONARD J. KOERNER,*
LAWRENCE S. KAHN,
ALAN G. KRAMS,

of Counsel.

*Counsel of Record

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1592—August Term 1991

Argued: May 6, 1992 Decided: August 2, 1993

Docket No. 92-7369

THE HERTZ CORPORATION,

Plaintiff-Appellant,

—against—

THE CITY OF NEW YORK, O. PETER SHERWOOD, in his official capacity as Corporation Counsel of the City of New York, and MARK GREEN, in his official capacity as Commissioner of Consumer Affairs of the City of New York,

Defendants-Appellees.

Before:

FEINBERG, PRATT and MCLAUGHLIN,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge*. Plaintiff sought injunctive and declaratory relief that would bar enforcement of defendant city's local law that forbids rental-car companies doing business in New York City from considering their customers' residences in making rental and pricing decisions. The district court dismissed the complaint, but enjoined enforcement of the local law pending this appeal.

Reversed and remanded.

PAUL C. SAUNDERS, New York, NY, (Cravath, Swaine & Moore, New York, NY, of Counsel), *for Plaintiff-Appellant.*

ALAN G. KRAMS, New York, NY (O. Peter Sherwood, Corporation Counsel of the City of New York, Leonard Koerner, Lawrence S. Kahn, Barry P. Schwartz, June R. Buch, Julie Mertus, of Counsel), *for Defendants-Appellees.*

Timothy Dyk, Washington, D.C. (Jones, Day, Reavis & Pogue, Washington, D.C., of Counsel), *for Amicus Curiae Chamber of Commerce of the United States of America.*

PRATT, *Circuit Judge*:

Hertz Corporation appeals from a judgment of the United States District Court for the Southern District of

New York, Whitman Knapp, *Judge*, that dismissed its complaint which sought to enjoin enforcement of Local Law No. 21 of 1992 of the City of New York, referred to informally as the "Hertz law".

FACTS AND BACKGROUND

On January 2, 1992, Hertz announced that it would increase the daily car-rental rates it charges by $56.00 for residents of the Bronx, $34.00 for residents of Brooklyn, $3.00 for residents of Manhattan, and $15.00 for residents of Queens. The increased rates were to be charged to persons residing in those four boroughs whenever they rented a car at a Hertz outlet in the New York metropolitan area, New Jersey, Southern Connecticut, or Eastern Pennsylvania. Out-of-city Hertz customers who rented a vehicle in one of these four boroughs would have no increased rates.

Hertz claims that renting cars to residents of these boroughs had resulted in extremely high liability expenses for the company. Specifically, Hertz alleges that although only about seven percent of Hertz's nationwide rentals occur in the New York area, more than 25 percent of its liability losses have occurred there. As one of the reasons, the company points to a state statute that holds car owners vicariously liable for any monetary damages caused by the operation of their vehicles. *See* N.Y. Veh. & Traf. § 388 (McKinney 1986). Another cause, says Hertz, is that juries in some of the affected boroughs have a history of awarding high damages to plaintiffs in personal injury cases. Hertz avers that its residency surcharges correspond directly to the average excess liability losses incurred per rental in the affected boroughs.

Hertz excludes several groups of renters from the increases: (1) those holding contracts with Hertz, such as federal and corporate accounts, and (2) certain other categories of renters—those possessing airline tickets, members of the Manhattan Preferred Renters Club, and Platinum Service customers—felt to be low-risk groups. In addition, members of the "Hertz Gold Club" are excluded, since they do not check in at a rental-car outlet and therefore could not practicably be notified of the increased rate. Hertz also has announced a "Responsible Renter Qualification Program", which permits those otherwise subject to the increased rates to apply for and receive an exemption upon meeting certain qualifications, including a safe driving record.

In response to Hertz's proposed surcharges for residents of four of its boroughs, the City of New York passed Local Law No. 21 of 1992 which amended chapter four of title 20 of the city's administrative code to provide that:

> No rental vehicle company shall refuse to rent a motor vehicle to any person otherwise qualified based on that person's residence, nor impose fees or charges based on that person's residence.

Through this local law, the city contends, that it was "exercising its reasoned legislative judgment that the social costs of the [Hertz pricing] practice are too high, given its potential for polarization and the fact that the burden falls hardest on minorities and the working poor."

In addition to enacting Local Law No. 21, the city commenced an action in Supreme Court, New York County, claiming that Hertz's rate increases violated (1) state and local law because of their disparate impact on minorities, and (2) section 396-z(10) of New York's General Business Law. That action is pending.

On March 27, 1992, Hertz commenced this action in the United States District Court for the Southern District of New York. It sought a declaratory judgment that the Hertz law is invalid and an injunction against its enforcement. The complaint alleged that Local Law No. 21 (1) is preempted by state law regulating the rental-car industry, and (2) violates several provisions of the United States Constitution: (a) the contract clause, (b) the commerce clause, and (c) the fourteenth amendment's protection for substantive due process and its prohibition against uncompensated takings. Finally, Hertz charged that Local Law No. 21 compels a violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (1988), and therefore is preempted and invalid under the supremacy clause of the United States Constitution.

Four days after it was filed, Hon. Whitman Knapp, ordered Hertz's complaint dismissed, but he enjoined the city from taking any action to effectuate the law pending the outcome of any appeal by Hertz. Hertz appealed the dismissal; the city did not cross-appeal.

Because the determination of Hertz's state-law preemption claim involved issues that were important to the continuing development of state law and potentially dispositive of this appeal, on June 10, 1992, we certified to the New York State Court of Appeals the question of "whether New York State legislation addressing car rental practices sets forth a sufficiently comprehensive scheme of regulations to preempt further legislation in the field by the municipalities of the state." *Hertz v. City of New York*, 967 F.2d 54, 57 (2d Cir. 1992). On December 22, 1992, the Court of Appeals answered this question in the negative. *See Hertz v. City of New York*, 607 N.E.2d 784 (N.Y. 1992).

The case is now before us to review the district court's resolution of the remaining issues: (1) the city's antitrust liability under the Sherman Act, (2) the impact of Local Law No. 21 on interstate commerce, and (3) Hertz's claims under 42 U.S.C. § 1983 (1988) based on takings law, the contract clause, and substantive due process.

DISCUSSION

Review of the grant of a motion under Fed. R. Civ. P. 12(b)(6) is *de novo*, and we must construe in Hertz's favor factual allegations in the complaint. *Allen v. Westpoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991). Our consideration, like the district court's, is limited to facts stated on the face of the complaint and in documents appended to the complaint or incorporated in the complaint by reference, as well as to matters of which judicial notice may be taken. *Id.* Dismissal of the complaint is proper only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted).

A. *The Sherman Act.*

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal." 15 U.S.C. § 1.

Initially we note that by controlling one aspect of the pricing process for rental cars, the Hertz law on its face restrained trade within the meaning of § 1 of the Sherman act. *See National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978) ("Price is the 'central

nervous system of the economy,' and an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face."). In *National Soc'y of Professional Eng'rs*, the Supreme Court concluded that an agreement among competitors to refuse to discuss prices with potential customers until after negotiations had resulted in the selection of an engineer restrains trade within the meaning of § 1 of the Sherman Act. The Court aptly noted, "[w]hile this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Id.* at 692. The agreement impeded the ordinary give and take of the market place. *Id.*

The fact that Local Law No. 21 does impose a restraint on trade only marks the beginning of our analytical journey, however, because the broad language of the Sherman Act precludes only those restraints of trade that are unreasonable. *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984); *see generally* Earl W. Kintner, 2 *Federal Antitrust Law* § 9.20, at 56 (1980). Unreasonable contracts, combinations, and conspiracies in restraint of trade enacted by state and local governments are unconstitutional as preempted by federal antitrust laws. *See generally* Phillip E. Areeda and Donald F. Turner, *Antitrust Law* ¶ 209, at 60 (Supp. 1992).

The threshold requirement of the statute is that there be a "contract, combination, * * * or conspiracy" to restrain trade or commerce. This element of the statute is usually clear when the conduct at issue is that of private parties; however, when the actor is a local governmental unit, two additional questions must be answered. The first arises from the Supreme Court's holding in *Fisher v. City*

of Berkeley, 475 U.S. 260 (1986), that in some circumstances, discussion of which follows, action by a city may not be a contract, combination, or conspiracy at all. *Id.* at 266-68. The second additional question addresses the extent to which the local governmental unit may be entitled to share in the immunity from antitrust liability that is accorded state actors, a topic that need be addressed only if we conclude that the challenged action conflicts with antitrust laws. *Id.* at 264. Finally, although courts have deemed some restraints so anticompetitive that they are held *per se* invalid, the presumption is that restraints are examined in light of the rule of reason—a more flexible standard that demands consideration of a variety of factors. Thus, we must also consider the appropriate standard by which to measure the reasonableness of the city's action.

The antitrust issues we must address, therefore, can be summarized as follows: (1) whether there is a contract, combination or conspiracy, (2) whether the city enjoys state-action immunity from antitrust liability, (3) the possible applicability of *per se* analysis to the city's law, and finally, (4) whether the rule of reason is the appropriate measure of Sherman Act liability for this municipal defendant. We will discuss each issue as applied to Local Law No. 21.

1. *Contract, Combination, or Conspiracy.*

The Supreme Court addressed the issue of municipal antitrust liability in *Fisher*, where the City of Berkeley had promulgated a rent-control ordinance that was administered by an independent, quasi-judicial board. The board calculated the annual, general rent adjustments and processed individual claims for variances. Opponents of the ordinance argued that it required price-fixing that, under

the traditional standards, was a *per se* unreasonable restraint of trade. The Supreme Court rejected this proposed analysis, and instead held that, on the facts before it, the city's action was not "concerted"—it did not meet the threshold requirement of being a contract, combination, or conspiracy. This was so because "[t]he rent ceilings imposed by the [city] Ordinance and maintained by the Rent Stabilization Board have been unilaterally imposed by government upon landlords to the exclusion of private control." *Fisher*, 475 U.S. at 266. Thus, the Court held the Berkeley ordinance to be a "unilateral action outside the purview of § 1." *Id.* at 266-67.

The Court then re-examined its two earlier cases that had addressed governmental antitrust liability. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). Despite the lack of an agreement between any of the regulated parties, the Supreme Court found in both *Midcal* and *Schwegmann Bros.* that the pertinent state statute called for private industry to engage in price-fixing, which the court held to be *per se* illegal. The *Fisher* Court explained that the factor distinguishing *Midcal* and *Schwegmann Bros.* was the role played by the governmental body in implementing the legislation. In both cases, the state had dictated price-setting that was to be performed not by the state, but by wholesalers and producers in the liquor industry.

The *Fisher* Court explained:

> Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of § 1. Certain restraints may be characterized as "hybrid," in that nonmarket mechanisms merely enforce private marketing deci-

> sions. Where private actors are thus granted "a degree of private regulatory power," the regulatory scheme may be attacked under § 1.

475 U.S. at 267-68 (citations omitted).

Fisher can be read to require us to examine first whether Local Law No. 21 qualifies as a "unilateral" restraint; if it does it falls outside § 1 of the Sherman Act, because it is not a "contract, combination * * * or conspiracy." In dismissing Hertz's Sherman Act claim, the district court adopted the city's view that the local law was a unilateral municipal action.

The Hertz law, however, lacks several features of the "unilateral" Berkeley ordinance. First, the law is not a "pure regulatory scheme", *Fisher*, 475 U.S. at 269, because it is not a "scheme" at all; the law is simply a directive for all rental-car companies doing business in New York City to remove one factor from their competitive-pricing structures. Second, the law lacks the independent, quasi-judicial board that in *Berkeley* could adjust rates and provide relief in individual circumstances. Finally, the City of Berkeley was operating in an area vital to its municipal authority—housing; less vital is the rental-car industry in New York City.

Nor does the Hertz law easily fit the fact pattern of the cases held to involve "hybrid" restraints—those that restrain trade through some combination of governmental and private conduct. The three Supreme Court cases in this category involved the pricing of liquor. *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); *Midcal*, 445 U.S. 97; *Schwegmann Bros.*, 341 U.S. 384. Each involved classic price-setting that was delegated by statute or regulation to private industry but was left unsupervised by the state legislature. The Hertz law, in contrast, does not purport to

authorize price-setting by private industry; it simply eliminates an element of price competition among industry members.

We reject the city's suggestion to apply *Fisher* expansively so as to view Local Law No. 21 as a unilateral action that lacks the degree of private-governmental agreement required to be a contract, combination, or conspiracy in restraint of trade. To do so would remove from the reach of the antitrust laws all local governmental actions not fitting the precise fact pattern of the liquor cases, and would preclude examination of their anticompetitive effects. At the same time, we also reject Hertz's contention that this case, like the "hybrid" liquor cases, presents a straight-forward example of price-fixing that is *per se* invalid.

Present here are several anticompetitive risks, gleaned from the Supreme Court's antitrust jurisprudence, that might warrant antitrust scrutiny for this municipal entity. The Hertz law may permit the city to impose on an industry unnecessary monetary costs that will have an extraterritorial impact. *See, e.g., City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 405 (1978) (plurality). The law may also obstruct regional efficiency and trigger economic Balkanization, because of the possibility that many independent local governments may follow suit and consequently distort the national market economy. *Id.* at 404, 408.

In short, while we have found no case dealing with a governmental act having attributes similar to the Hertz law, we conclude that the Hertz law is not a "unilateral" restraint. It is closer to, although not identical with, those actions categorized as "hybrid", because it removes one element of competition in car-rental pricing, but does not

further regulate or review the prices set by rental companies. In addition, some of the risks of anticompetitive behavior enunciated in *City of Lafayette* and relied on in *324 Liquor Corp.* are present in Local Law No. 21.

Accordingly, we disagree with the district court's conclusion that the Hertz law is a unilateral restraint that lacks the requisite contract, combination, or conspiracy to warrant antitrust review. Local Law No. 21 calls for anticompetitive private conduct in setting rental rates and making rental decisions. The law thus merits hybrid treatment; however, we must first determine whether the city has pointed to sufficient state involvement in the enactment of Local Law No. 21 to entitle it to state-action immunity.

2. *State-Action Immunity from Antitrust Liability for Municipality.*

Having determined that the Hertz law is a contract, combination, or conspiracy in restraint of trade, we now turn to the issue of whether New York State has cloaked the City of New York with immunity for any antitrust violations created by the Hertz law. *Fisher*, 475 U.S. at 264 (consideration of state-action immunity unnecessary unless actual conflict with antitrust laws is established).

The Supreme Court in *Parker v. Brown* held that the Sherman Act does not apply when anticompetitive restraints are imposed by the states "as an act of government". 317 U.S. 341, 352 (1943). Under principles of federalism and state sovereignty, a state actor is accorded absolute immunity from antitrust liability. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991).

Local governments may be entitled to state-action immunity. While *Parker* state-action immunity does not apply directly to *local* governments, a municipality's restriction of competition may sometimes be an authorized implementation of state policy; if it is, then the municipality may share in the immunity accorded to state actions. *City of Lafayette*, 435 U.S. at 413 (municipal government shares in *Parker* immunity if its activity was pursuant to state policy to displace competition with regulation or monopoly public service).

The Supreme Court in *FTC v. Ticor Title Insurance Co.* reiterated the "two-part test applicable to instances where private parties participate in a [local government's] price fixing regime. 'First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself.' " 112 S. Ct. 2169, 2176 (1992) (quoting *Midcal*, 445 U.S. at 105).

Thus, a municipality may benefit from the "state action" exemption only if it has acted pursuant to a clearly articulated state policy. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52 (1982) (plurality); *324 Liquor Corp.*, 479 U.S. at 343-45. As we held in an analogous Clayton Act context:

> The clarity of such [articulated state] policy is often a function of how broadly the legislation is drawn, with the existence of such policy being more readily discernible in narrowly drawn legislation. The legislation must contain an affirmative showing of intent, though it need do no more than authorize the challenged conduct. So long as the resulting anticompetitive activities are a foreseeable consequence of the state delegation, the "clear articulation" stan-

> dard has been met. To meet this requirement the party claiming the state action defense must show that the "legislature contemplated the action complained of." "[A]ctive state supervision"—is no longer required in the case of a municipality.

Cine 42nd St. Theater Corp. v. Nederlander Org., 790 F.2d 1032, 1043 (2d Cir. 1986) (citations omitted).

The State of New York has not granted New York City any particular authority over the car-rental field; instead the Hertz law represents an exercise of the city's home-rule powers granted by the state constitution and statutes. *See* N.Y. Const. art. IX, § 2(c)(i) (McKinney 1987) ("[E]very local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government"); Municipal Home Rule Law § 10 (McKinney 1969). The Supreme Court has held that a similar home-rule provision in the Colorado state constitution reflected the state's position of "mere *neutrality*" regarding local activities undertaken pursuant to that provision. *Community Communications Co.*, 455 U.S. at 55 ("A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought.").

Thus, local government actions that are grounded in home-rule authority are not carried out pursuant to a clearly articulated state policy. *See also Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *Cine 42nd St.*, 790 F.2d 1032. In adopting Local Law No. 21 the City of New York did not operate from any clearly articulated state policy that encourages or foresees anti-competitive activity in the rental-car field. *Cf. Cine 42nd St.*, 790 F.2d

at 1043-44; *see also Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 95 (2d Cir.) (citing *Town of Hallie*, 471 U.S. at 38), *cert. denied*, 479 U.S. 872 (1986).

We conclude, therefore, that in this challenge to Local Law No. 21, New York City is not protected by state-action immunity from antitrust liability. We recognize that when a state or local governmental action compels *private* anticompetitive behavior, state-action immunity would additionally require a showing that the state actively supervised that private conduct. *Midcal*, 445 U.S. at 105. However, because we have determined that the lack of a clear state policy directing the city's legislative efforts prevents the city from enjoying state-action immunity here, we need not further address the active-supervision question.

Having determined, based on the allegations of the complaint, that the Hertz law comes closest to being a "hybrid" restraint, *i.e.*, a contract, combination, or conspiracy in restraint of trade, involving the city and the car-rental industry, and that the city has no state-action immunity, we must reverse the district court's dismissal of the complaint and remand for further analysis of the remaining antitrust issues. To assist the parties and the district court on the remand, we set forth some guidance for some of the problems that remain in this difficult case.

3. *Per Se Analysis.*

A *per se* rule is used in the relatively narrow circumstance where courts have sufficient experience with the activity to recognize that it is plainly anticompetitive and lacks any redeeming virtue. *Broadcast Music Inc. v. Columbia Broadcasting Sys. Inc.*, 441 U.S. 1, 8 (1979); *see also Business Elecs.*, 485 U.S. at 723 (*per se* rule

appropriate only for manifestly anticompetitive conduct that would almost always tend to restrict competition and decrease output); *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 107-08 (1984) (court reluctant to extend *per se* analysis where economic impact of challenged practice not immediately obvious). For example, an agreement to fix prices is invalid regardless of any offer of proof to establish that the resulting price is reasonable. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958); *see also Schwegmann Bros.*, 341 U.S. at 385-86; *Catalano Inc. v. Target Sales Inc.*, 446 U.S. 643, 648 (1980) (per curiam) (agreements between private competitors to eliminate discounts is *per se* an illegal price fixing scheme).

Hertz argues that this case is sufficiently akin to horizontal price fixing to warrant *per se* treatment. We disagree. The setting is inappropriate for *per se* analysis. Not only have courts had little exposure to issues surrounding efforts by local governments to restrain trade through regulation, but this particular effort involves the novel claim by the city that the local law promotes a non-economic objective: the virtue of anti-discrimination.

Moreover, this case cannot be easily grouped with previous cases: it is not a rate-setting case, *see, e.g., Ticor Title Ins. Co.*, 112 S. Ct. at 2169 and *Fisher*, 475 U.S. at 260, as the law does not set a maximum or minimum price for rental cars in New York City; nor is it a zoning case, *see, e.g., Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991); a licensing case, *see, e.g., Broadcast Music, Inc.*, 441 U.S. at 1 and *United States Gypsum Co. v. National Gypsum Co.*, 352 U.S. 457 (1957); or a franchise-granting case, *see, e.g., Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). Finally, and most significantly, the Supreme Court has specifically sug-

gested that *per se* treatment may not be well tailored to assessing municipal antitrust liability, noting that "certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." *Community Communications Co.*, 455 U.S. at 56 n.20 (quoting *City of Lafayette*, 435 U.S. at 417 n.48).

In short, we do not think it wise to adopt in this case, a restrictive *per se* rule that would require automatic invalidation of a local government's duly-passed legislation, without regard to the circumstances prompting its enactment.

4. *Rule-of-Reason.*

We next consider the applicability of the rule of reason to the Hertz law.

> Ordinarily, whether particular concerted action violates § 1 of the Sherman Act is determined through case-by-case application of the so-called rule of reason—that is, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."

Business Elecs., 485 U.S. at 723 (citation omitted).

The traditional rule-of-reason approach requires the defendant to demonstrate that the procompetitive aspects of the agreement outweigh its anticompetitive aspects.

> [The Rule of Reason] has been used to give the [Sherman] Act both flexibility and definition, and its central principle of antitrust analysis has remained constant. Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in

> favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.

National Soc'y of Professional Eng'rs, 435 U.S. at 688.

Agreements subject to a rule-of-reason analysis have traditionally been evaluated for their competitive effect by

> analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. * * *. [T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

Id. at 692 (footnote omitted).

" 'The factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.' " *Business Elecs.*, 485 U.S. at 723 (quoting *Continental T.V., Inc.*, 433 U.S. at 49).

Significantly, none of these rule-of-reason cases has involved a challenge to restraints on competition imposed by municipal activity. Application of the rule to this emerging legal field will require considerable tailoring to achieve even an approximate fit.

Under the rule-of-reason approach, the district court must balance the city's articulated justifications for promulgating the anticompetitive regulation against the antitrust harm caused by the regulation. *National Soc'y of*

Professional Eng'rs, 435 U.S. at 688; *accord National Collegiate Athletic Ass'n*, 468 U.S. at 104 (under Sherman Act, one must judge validity of restraint on trade according to its impact on competition). The legality of the city's restraint on trade must be determined by weighing all the relevant factors—including the history of the restraint, and the evil to be prevented, *see, e.g., Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984) (rule of reason requires weighing of relevant circumstances of case); *United States v. National Soc'y of Professional Eng'rs*, 404 F. Supp. 457, 460-61 (D.D.C. 1975) (same); the history and practices of the relevant industry, *see, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (inquiry into market power and market structure necessary to gauge combination under rule-of-reason approach); *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 343-44 (1982) (same); the local government's reasons for adopting the particular restraint; and the end sought to be attained, *see Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1571 (5th Cir. 1984) (en banc) (Higginbotham, *J.*, concurring) (adaptation of rule of reason to anticompetitive local governmental conduct requires courts to consider factors not traditionally within rule, including above listed factors). Accordingly, the district court may consider the city's articulated concern of avoiding nondiscrimination by ensuring that Hertz's pricing and rental decisions do not burden minorities and the working poor. This places into the economic scale of traditional antitrust analysis noneconomic federal values embodied in the thirteenth and fourteenth amendments as well as in many of the federal statutes. We think consideration of such a federal policy is appropriate within the rule-of-reason analysis as it is applied to a municipality.

Hertz, of course, is entitled on remand to present evidence disputing the validity and strength of the city's justifications for this anticompetitive regulation. The city's justifications must be assessed in light of its stated end; this makes relevant Hertz's explanation for its price increase—specifically, its claim to have experienced exceedingly high liability losses in certain boroughs. The city's history of negotiating with Hertz concerning what it felt to be an objectionable pricing policy is relevant, as is Hertz's consideration of less burdensome pricing methods. For example, the court may find relevant the city's contention that Hertz could recoup its losses by raising each renter's fee by $3.29 in the New York region.

In conclusion, on the antitrust issue, we remand to the district court for further proceedings.

B. *Commerce Clause.*

Hertz also contends that Local Law No. 21 impermissibly burdens interstate commerce. *See* U.S. Const. art. I § 8 cl. 3. The constitution's affirmative grant to congress of powers over interstate commerce means that states have limited authority to erect barriers against interstate trade, *see Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980), a limitation that applies equally to municipal legislation. *Dean Milk v. City of Madison*, 340 U.S. 349, 356 (1951). Hertz alleged that the city's local law violates the commerce clause "to the extent that the Hertz Law effectively forces Hertz to raise its rental rates to residents of other states * * *." Hertz outlines in its complaint and other papers several means by which it might comply with Local Law No. 21 and still avoid being overwhelmed by the increased costs of renting to city residents. The corporation could (1) cease entirely its operations in New York City; (2) raise its rates for out-of-state residents who

rent in the New York area; or (3) raise rental rates in other states.

The district court rejected this commerce-clause claim. Judge Knapp found that Hertz has the additional option of raising its rates evenly throughout all of New York City, or "finding other ways of dealing with the problem". These options, said the district court, take the sting out of the alleged injury to interstate commerce.

To make out a claim that this regulation impermissibly burdens the commerce clause, Hertz must sufficiently plead that the local law discriminates against interstate commerce either on its face, or in its effect. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). Local Law No. 21 does not burden out-of-state customers expressly; it states only that rental-car companies may not "impose fees or charges based on [a] person's residence." Since the law does not facially burden interstate commerce, it must be upheld unless the actual burden it "impose[s] on interstate trade [is] 'clearly excessive in relation to the putative local benefits' ". *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

In its complaint, Hertz has not sufficiently alleged that Local Law No. 21 has a discriminatory impact on interstate commerce. First, Hertz does not allege that an *inter*state effect must flow from this *intra*state municipal regulation. Second, Hertz does not define what significant burden on interstate commerce is posed by Local Law No. 21. Hertz itself tells us that it can comply with the local law and maintain its profit level in New York City through a range of options, not all of which impact interstate commerce. Thus, Hertz has yet to explain how the city's car-pricing ordinance compels action that discriminates against interstate commerce.

Of course, there was little time available in the district court proceedings to fully explore the implications of Hertz's commerce-clause argument. Only four days elapsed between the filing of the complaint and the district court's order dismissing the complaint. Since this case must be remanded for the district judge to apply a rule-of-reason analysis to Hertz's Sherman Act claim, Hertz should have the opportunity, if it so desires, to develop further its contentions with respect to the law's impact on interstate commerce.

C. *Remaining Claims.*

Judge Knapp also dismissed Hertz's remaining contentions that Local Law No. 21 violates 42 U.S.C. § 1983 because it (1) is an unconstitutional regulatory taking, (2) impermissibly impairs existing contracts, and (3) offends principles of substantive due process.

1. *Regulatory Taking*

Hertz has failed to state a claim that Local Law No. 21 imposes a regulatory taking in violation of the fourteenth amendment. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (regulation of property which goes too far may amount to taking). Even assuming that takings cases connected with the diminution of real estate values apply in this business setting, the local law does not effect a taking because Hertz and other rental-car companies retain the right to set rates in New York City at any level they desire. *See, e.g., Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978) (per curiam) (not every deprivation of use, possession, or control is "taking"; character and extent of interference must be examined). Hertz unquestionably retains an "economically

viable" use of its property, *see, e.g., Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127, 138 n.36 (1978), and finally, the taking cases offered by Hertz relating to the public-utility industry do not apply here. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 306-08 (1989) (defining constraints posed by takings clause on state-rate regulation of public utility).

2. *Impairment of Contract.*

Hertz alleged that application of Local Law No. 21 to car-rental contracts in place before it takes effect would unconstitutionally impair those contracts by forbidding Hertz to collect fees for rental cars that it had already contracted to receive. *See* U.S. Const. art. I, § 10. The city, however, has removed the Hertz law from any collision with the dictates of the contract clause, having assured us that the law does not apply to these outstanding contracts.

3 *Substantive Due Process.*

Economic regulation need only be rationally related to a legitimate governmental purpose. *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 106-07 (1978) (since demise of substantive due process in economic area, due process provides legislative bodies broad scope to experiment with economic problems); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124 (1978) (citing *Ferguson v. Skrupa*, 372 U.S. 726, 730-31 (1963) (searching scrutiny of economic legislation has long been abandoned; "vague contours" of due process clause do not permit courts to sit as superlegislature to weigh wisdom of legislation).

The city contends that the Hertz Law will help prevent discriminatory business practices in the rental-car indus-

try, by requiring rental-car companies to refrain from using a renter's residence in pricing and renting decisions. The city's rationale is that rental-car companies must find other means of determining and dealing with the customers who are likely to cause them high liability expenses; thus, individual customers would enjoy rates more closely related to their own particular risk. Since it is not irrational to conclude that the city's regulation may cut down on incidents of discrimination in car rentals based on the renter's residence, the Hertz law passes this substantive due process challenge.

4. *Section 1983.*

42 U.S.C. § 1983 creates civil liability for deprivations of certain federal rights under color of state law. It is a procedural vehicle which permits suit for violations of constitutional and federal statutory provisions. *See generally* 1 Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* (2d ed. 1991). The district court dismissed Hertz's § 1983 claim because it rejected all of the underlying constitutional and antitrust claims. While we affirm the district court's dismissal of Hertz's claims of a regulatory taking, impairment of contracts, and violation of substantive due process, we are remanding for further consideration of its antitrust and commerce-clause claims, and leave it for the district court to determine what role, if any, § 1983 may have on the resolution of those claims.

CONCLUSION

Reversed and remanded for further proceedings in accordance with this opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Docket No. 92 Civ. 2192 (WK)

THE HERTZ CORPORATION,

Plaintiff,

-against-

THE CITY OF NEW YORK, O. PETER SHERWOOD, in his official capacity as Corporation Counsel of the City of New York, and MARK GREEN, in his official capacity as Commissioner of Consumer Affairs of the City of New York,

Defendants.

MEMORANDUM AND ORDER

WHITMAN KNAPP, U.S.D.J.

By this complaint plaintiff seeks injunctive relief pursuant to Fed. R. Civ. P. 65 restraining and enjoining defendants from enforcing a local law of the City of New York, Int. No. 71-A, and a declaratory judgment pursuant to 28 U.S.C. §§2201, 2202 declaring said law invalid and unenforceable. Having heard the facts and arguments advanced by plaintiff in support thereof, and defendants' arguments in opposition thereto, for the reasons stated on the record on this date, I find that defendants

should not be enjoined from enforcing the Hertz law and the complaint should be dismissed.

Accordingly, I hereby direct the Clerk to enter a judgment to that effect forthwith. However, pursuant to Fed. R. Civ. P. 62(c), provided that the plaintiff appeals from this order within twenty-four hours hereof and that it expeditiously prosecutes such appeal, I hereby enjoin the defendant the City of New York from taking any action to effectuate said law pending the outcome of such appeal or until the Court of Appeals shall have modified or vacated this order. The Corporation Counsel is specifically enjoined from performing any ministerial act such as filing the law during the pendency of this order.

SO ORDERED.

Dated: March 31, 1992
New York, New York

/s/ WHITMAN KNAPP, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Docket No. 92-CV-2192 (WK)

THE HERTZ CORPORATION,

Plaintiff,

-against-

THE CITY OF NEW YORK, O. PETER SHERWOOD, in his official capacity as Corporation Counsel of the City of New York, and MARK GREEN, in his official capacity as Commissioner of Consumer Affairs of the City of New York,

Defendants.

DECISION OF THE COURT
(Read in Open Court March 31, 1992)

Chief Justice Stone used to say of the Second Circuit that they are often in error but never in doubt. Well, I don't come into that category because I am still in considerable doubt, but I have to make a decision.

First, with respect to the antitrust aspect, again plaintiff has a penchant for citing oddball cases. You already cited one with Oliver Wendell Holmes writing the opinion and Brandeis dissenting, and now he cites one with Marshall writing the decision and Brennan dissenting.

Mr. Saunders accurately stated the proposition that what divided him from Ms. Goodman is the definition of hybrid. On that I have come down on Ms. Goodman's side. It seems to me what the Court means when it says hybrid is some kind of governmental scheme which, one way or another, allows private people to manipulate prices. That is maybe not the accurate description, but that is in general what it seems to me hybrid means.

I don't find any case that says that regulating an industry in such a way as to eliminate [around a public boss or otherwise] a factor in fixing the price can be used.[1] Therefore, I conclude that this is not a hybrid. As Justice Marshall said, it doesn't make any difference whether it is state or city, it is just an attempt to make a regulation, which I have already ruled does not violate any other constitutional inhibition, and therefore I couldn't enjoin its enforcement.

With respect to the second point, I want to make clear what I deem my function is. I deem my function not to be to figure out how I would decide the case if I were on the Court of Appeals of New York, or even how I would decide the case if it were before me in Special Term of New York County. It might be that if I were in either of those two capacities, I would go on with the plaintiff. Even if I were on the Court of Appeals and a majority of my colleagues went the other way, I might file a dissenting opinion. But my function is to try to predict what I think the Court of Appeals, as now constituted, would do. That is what impressed me about Judge Kaye's opinion in the Albany Area Builders case. The state regulation was so much more comprehensive than the one we are here dealing with that it

---

[1]Brackets in original.

would seem adequate just for Judge Kaye to say it is so comprehensive that we just can't have anything more in in there, period -- which she didn't. She went on to say that it is equally manifest that TIFL -- that was the regulation in question -- intrudes on the legislative scheme at least in two significant respects: First, because TIFL directs money to be paid into a separate fund, those moneys may escape the budgetary process established by the state; second, it allows towns to evade statutory requirements for budgeting, accounting for revenues, and documenting expenditures.

It seems to me, despite many statements in various opinions, that you don't have to show that it actually conflicts with the state. It is my feeling that the Court of Appeals recently has come down in favor of town sovereignty, so to speak, and is not likely to outlaw this law on that basis.

I need say no more, because the last thing that the New York Court of Appeals needs from me is an analysis of their problems.

I will tell you what I have done to expedite the appeal. I have prepared this order, copies of which I will hand out to you.

This page was intentionally
left blank

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 92-7369

Filed June 10, 1992

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of June, one thousand nine hundred and ninety-two.

PRESENT: HONORABLE WILFRED FEINBERG,
HONORABLE GEORGE C. PRATT,
HONORABLE JOSEPH M. MCLAUGHLIN,
Circuit Judges.

THE HERTZ CORPORATION,

Plaintiff-Appellant,

—against—

THE CITY OF NEW YORK, O. PETER SHERWOOD, in his official capacity as Corporation Counsel of the City of New York, and MARK GREEN, in his official capacity as Commissioner of Consumer Affairs of the City of New York,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration of the briefs, appendix, record and the oral argument in this appeal, it is hereby ORDERED that the Clerk of the Court transmit to the Clerk of the New York Court of Appeals a Certificate in the form attached, together with a complete set of the briefs, appendix, and record filed by the parties with this Court.

WILFRED FEINBERG

Wilfred Feinberg, U.S.C.J.

GEORGE C. PRATT

George C. Pratt, U.S.C.J.

JOSEPH M. MCLAUGHLIN

Joseph M. McLaughlin, U.S.C.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 92-7369

Filed June 10, 1992

THE HERTZ CORPORATION,

Plaintiff-Appellant,

—against—

THE CITY OF NEW YORK, O. PETER SHERWOOD, in his official capacity as Corporation Counsel of the City of New York, and MARK GREEN, in his official capacity as Commissioner of Consumer Affairs of the City of New York,

Defendants-Appellees.

Certificate to the New York Court of Appeals (pursuant to McKinney's Revised 1991 New York Rules of Court § 500.17(b)—certification of unsettled question of law)

The Hertz Corporation ("Hertz") is a Delaware corporation authorized to do business in the State of New York, engaged in the business of renting vehicles to customers in New York and throughout the country. On January 2, 1992, Hertz announced that it would increase the daily rental rates it charges in the New York area by

$56.00 for residents of the Bronx, by $34.00 for residents of Brooklyn, by $3.00 for residents of Manhattan and by $15.00 for residents of Queens. In response, the New York City Council enacted New York City Local Law 21 of 1992 (the "Hertz law") which amends Chapter Four of Title 20 of the Administrative Code of the City of New York to provide that "[n]o rental vehicle company shall refuse to rent a motor vehicle to any person otherwise qualified based on that person's residence, nor impose fees or charges based on that person's residence." New York City Local Law 21 § 1 (1992). The Hertz law thus prohibits car rental companies from calculating rental rates based on the renter's residence.

On March 27, 1992, Hertz commenced the present action in the United States District Court for the Southern District of New York, seeking a declaratory judgment and injunctive relief invalidating and precluding the enforcement of the Hertz law on the grounds that it violated the preemption doctrine of the New York state constitution, a well as provisions of the federal constitution and the Sherman antitrust act. In its state law argument, Hertz contends that New York State law regulating the rental car industry preempts the city's local law. *See generally, Albany Area Builders Ass'n v. Guilderland*, 74 N.Y.2d 372, 377-79, 547 N.Y.S.2d 627, 629 (1989) (court found preemption based on the comprehensive and detailed nature of the state legislation and on the declaration of state policy); *Robin v. Incorporated Village of Hempstead*, 30 N.Y.2d 347, 350, 334 N.Y.S.2d 129, 131 (1972) (same); *Ba Mar, Inc. v. County of Rockland*, 164 A.D.2d 605, 612-14, 566 N.Y.S.2d 298, 303-04 (2nd Dep't 1991) (same).

Specifically, Hertz argues that various provisions of the New York General Business Law, especially sections 396-z, 391-g, 391-i an 398-b, establish a "comprehensive and detailed regulatory scheme" regarding the rental car industry and evince the state legislature's intent to pre-empt further regulation in the field by the City of New York. *See Albany Area Builders Ass'n*, 74 N.Y.2d at 372, 546 N.E.2d at 920, 547 N.Y.S.2d at 627 (1989).

The city, in response, cites state law that it claims supports the compatibility of Local Law 21 and state legislation. *See New York State Club Ass'n v. New York*, 69 N.Y.2d 211, 505 N.E.2d 915, 513 N.Y.S.2d 349 (1987). The city asserts that it acted in accord with the New York State Constitution which places only two limitations on the grant of the city's authority: "(1) the local government (here, the City of New York) may not exercise its police power by adopting a local law inconsistent with constitutional or general law; and (2) the City may not exercise its police power when the legislature has restricted such an exercise by preempting the area of regulation." *New York State Club Ass'n*, 69 N.Y.2d at 217 (citations omitted); *see also* N.Y.Const., art. IX, § 2 (McKinney 1987); N.Y. Mun. Home Rule Law, § 10(1)(ii) (McKinney 1969). The city further contends that the state's acts in the car rental area do not "evinc[e] a State purpose to exclude the possibility of varying local legislation." *Monroe-Livingston Sanitary Landfill, Inc. v. Caledonia*, 51 N.Y.2d 679, 683, 417 N.E.2d 78, 435 N.Y.S.2d 966 (1980). *See also People v. New York Trap Rock Corp.*, 57 N.Y.2d 371, 378, 442 N.E.2d 1222, 456 N.Y.S.2d 711 (1982) (same); *People v. Judiz*, 38 N.Y.2d 529, 532, 344 N.E.2d 399, 381 N.Y.S.2d 467 (1976) (finding no preemption of local law

banning imitation pistols despite duplicative state scheme).

In a memorandum and order dated March 31, 1992, the district court dismissed Hertz's complaint in its entirety for failure to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). Enforcement of the Hertz law has been enjoined pending the outcome of this appeal.

The parties have cited no New York case, and this court has found none, addressing the precise issue before us:

> whether New York State legislation addressing car rental practices sets forth a sufficiently comprehensive scheme of regulations to preempt further legislation in the field by the municipalities of the state.

This question should be decided by the New York Court of Appeals because it requires interpretation of New York statutes and caselaw, and directly involves the application of an important public policy of the State of New York. Moreover, the New York Court of Appeals is best situated to guide the growth of the state's preemption jurisprudence, a doctrine of unique state interest, because it requires balancing the respective roles of the state and its municipalities. The question is important both to Hertz and other car rental agencies doing business in New York, and indeed, even to the State of New York itself, as evidenced by the initiation of a lawsuit filed January 17, 1992, pending in the New York State Supreme Court, New York County, in which the city, the state attorney general and the state comptroller have challenged Hertz's residence-based rates as violat-

ing § 396-z of the General Business Law. *People v. Hertz Corp.*, Index No. 40329/92.

The question certified should be addressed "at this time", New York Rules of Court § 500.17(b), because this court's determination of the federal claims advanced by Hertz will be necessary only if state preemption law upholds the authority of the city to enact Local Law 21. On the other hand, if the Hertz law is preempted by state law, this action by Hertz against the city can be terminated summarily.

The foregoing is hereby certified to the Court of Appeals for the State of New York as ordered by the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
This 10th day of June, 1992

ELAINE GOLDSMITH
Clerk,
United States Court of Appeals
for the Second Circuit

NEW YORK STATE COURT OF APPEALS

USCOA,2 No. 285

HERTZ CORPORATION, Plaintiff, v. CITY OF NEW YORK et al.,

Defendants.

Argued November 19, 1992; decided December 22, 1992

OPINION OF THE COURT

SMITH, J.

Pursuant to section 500.17 of the Rules of the Court of Appeals (22 NYCRR 500.17), the United States Court of Appeals for the Second Circuit has certified to this Court the following question:

> "whether New York State legislation addressing car rental practices sets forth a sufficiently comprehensive scheme of regulations to preempt further legislation in the field by the municipalities of the state." (967 F2d 54, 57.)

The question certified is answered in the negative for the reasons that follow.

The Hertz Corporation (Hertz), a Delaware corporation authorized to do business in the State of New York, is engaged in the business of renting vehicles to customers in New York and throughout the country. On January 2, 1992, Hertz announced that it would increase the daily rental rates it charges in the New York City area by

$56 for residents of the Bronx, $34 for residents of Brooklyn, $3 for residents of Manhattan and $15 for residents of Queens to offset excess liability losses attributable to renters from those boroughs. In response, the New York City Council adopted a local law* (the Hertz Law) which would amend chapter 4 of title 20 of the Administrative Code of the City of New York to provide that "[n]o rental vehicle company shall refuse to rent a motor vehicle to any person otherwise qualified based on that person's residence, nor impose fees or charges based on that person's residence." The City also filed a complaint in Supreme Court, New York County, alleging that the rate increases violated (1) State and local law because of their disparate impact on minorities, and (2) section 396-z (10) of the General Business Law. That action is pending.

On March 27, 1992, Hertz commenced this action in the United States District Court for the Southern District of New York seeking injunctive relief, pursuant to Federal Rules of Civil Procedure rule 65, restraining and enjoining the City of New York from enforcing the Hertz Law and, in addition, a judgment declaring the Hertz Law

---

* This local law (Intro No. 71-A) was passed by the City Council on March 12, 1992 and approved by the Mayor on March 27, 1992, but prior to recordation by the New York City Clerk, the Second Circuit Court of Appeals enjoined the law's enforcement (*see*, 967 F2d 54, 57, *supra*). Had the Hertz Law proceeded along the normal course it would have become Local Law No. 21, a designation adopted by the Federal courts. However, due to the injunction, unrelated legislation was ultimately enacted as Local Law No. 21 of 1992. For purposes of this decision, the pertinent local law will be referred to as the Hertz Law.

invalid and unenforceable upon the ground that it violates the preemption doctrine of the New York State Constitution (NY Const, art IX, § 2 [c]), the Federal Constitution and the Sherman Antitrust Act. Hertz argued that New York State law regulating the rental vehicle industry preempts the City's local law. In response, the City cited State law that it claims supports the compatibility of the Hertz Law and State legislation.

The Federal District Court dismissed Hertz's complaint, stating that the City should not be enjoined from enforcing the Hertz Law. However, the Court barred the City from taking any action to effectuate the law pending the outcome of any appeal by Hertz. On appeal, the United States Court of Appeals for the Second Circuit certified the question to this Court and this Court accepted the certified question (80 NY2d 854).

Hertz contends that the City's law is inconsistent with and preempted by existing State regulation, especially sections 396-z, 391-g, 391-i and 398-b of the General Business Law, because those State statutes establish a comprehensive and detailed regulatory scheme evincing a legislative intent to preempt municipal laws dealing with rental vehicle company practices. The City argues that the State scheme makes no specific reference to residence-based pricing legislation and does not create the kind of comprehensive and detailed regulatory scheme that evinces an implied intent to preclude the possibility of all further regulation of that industry.

It is well settled that "[a] local law may be ruled invalid as inconsistent with State law not only where an express conflict exists between the State and local laws, but

also where the State has clearly evinced a desire to preempt an entire field thereby precluding any further local regulation" (*Jancyn Mfg. Corp. v. County of Suffolk,* 71 NY2d 91, 96-97; *see also, New York State Club Assn. v. City of New York,* 69 NY2d 211, 217, *affd* 487 US 1; *People v. New York Trap Rock Corp.,* 57 NY2d 371, 378; *People v. De Jesus,* 54 NY2d 465, 468-470).

Here, there is no express conflict between the State and local law. Moreover, no preemptive intent in the field of rental vehicle company practices is evident from the Legislature's declarations in sections 396-z, 391-g, 391-i and 398-b of the General Business Law. Section 396-z was amended in 1988 to deal with specific abuses in the rental vehicle industry. That section, among other things, prohibits a rental vehicle company from imposing charges on a renter, except the rental rate, taxes and mileage charges, if any, as a condition of renting the vehicle. Section 391-g prohibits the agencies from discriminating against renters on the basis of age. Section 391-i forbids discrimination on the basis of credit card ownership and section 398-b prohibits discrimination on the basis of race, color, ethnic origin or sex. None of these statutes addresses the question of whether the rental vehicle companies can refuse to rent cars to an individual or impose fees or charges based on that individual's residence. Nor is the statutory scheme enacted by the Legislature so broad in scope or so detailed as to require a conclusion that all local law in the area of rental vehicle company practices is preempted. These statutes merely proscribe discriminatory practices against renters or the imposition of additional rental fees, such as fuel and airport surcharges or fees for transportation to the location where the rental vehicle will be delivered. Thus, it cannot be said that the statutory scheme enacted by the Legislature

is so broad in scope or so detailed as to preclude all local regulation in the field.

Similarly, the State regulations imposed on all motor vehicles registered in the State, including vehicles owned by rental companies, do not evince an intent by the State to occupy the entire field of rental car company practices. The Vehicle and Traffic Law requires all owners of vehicles, including owners of rental vehicles, to comply with the licensing, registration, safety, inspection, and insurance mandates of the Commissioner of Motor Vehicles (*see, e.g.,* Vehicle and Traffic Law §§ 301, 383, 390, 1229-c; *see also,* Insurance Law § 2131). In addition, the State imposes a special tax on passenger car rentals (Tax Law § 1160). However, these statutes also do not address the question of whether rental vehicle companies can charge rental fees based on area of residency within the State and do not establish that the Legislature "enacted a comprehensive and detailed regulatory scheme in the field" (*see, Albany Area Bldrs. Assn. v. Town of Guilderland,* 74 NY2d 372, 377).

The State legislation in the field applies generally to all vehicles registered in the State and refers occasionally to vehicles owned by rental car companies. In addition, although the State statutes prohibit discrimination against renters on the basis of race, color, ethnic origin, sex, age, and credit card ownership, and bars the imposition of charges, except for rental rates, taxes and mileage, the statutes do not regulate the amounts that these companies can charge to residents of the various areas within the State. Thus, it cannot be said that, by enacting these statutes, the Legislature intended to regulate the entire field of rental

vehicle company practices and preempt local legislation on that subject matter.

Accordingly, the question certified should be answered in the negative.

Acting Chief Judge SIMONS and Judges KAYE, TITONE, HANCOCK, JR., and BELLACOSA concur.

Following certification of a question by the United States Court of Appeals for the Second Circuit and acceptance of the question by this Court pursuant to section 500.17 of the Rules of Practice of the Court of Appeals (22 NYCRR 500.17), and after hearing argument by counsel for the parties and consideration of the briefs and records submitted, certified question answered in the negative.

N.Y.C. Local Law, Int. No. 71-A, 1-A Proceedings of the Council of the City of New York 838 (1992) (to be codified at N.Y.C. Admin. Code §§ 20-695 to 20-698)

A LOCAL LAW to amend the Administrative Code of the City of New York in relation to rental car agencies.

Be it enacted by the Council as follows:

Section one. Chapter four of title 20 of the administrative code of the City of New York is hereby amended by the addition of a new subchapter 11, to read as follows:

SUBCHAPTER 11
MOTOR VEHICLE RENTALS

§ 20-695. Definition. "Rental vehicle company" means any person or organization, or any subsidiary or affiliate, including a franchise, in the business of providing rental vehicles to the public from locations in the City of New York.

§ 20-696. Discriminatory practices prohibited. No rental vehicle company shall refuse to rent a motor vehicle to any person otherwise qualified based on that persons's residence, nor impose fees or charges based on that person's residence.

§ 20-697. Violations. a. Any rental vehicle company which shall violate any of the provisions of this subchapter or of the rules promulgated pursuant to this subchapter shall be liable for a civil penalty not to exceed five hundred dollars for each such violation, to be recovered

in a civil action. For the purposes of this subchapter, each rental vehicle transaction which violates section 20-696 of this subchapter shall constitute a separate violation.

b. Whenever any rental vehicle company engages in any act or practice which constitutes a violation of any provision of this subchapter, the corporation counsel may bring a civil action in any court of competent jurisdiction on behalf of the city for injunctive and other appropriate relief to enforce the provisions of this subchapter.

c. In addition to the provisions of subdivisions a and b of this section, the commissioner may, upon notice, hold hearings to determine whether a violation of section 20-696 has occurred. Such notice shall contain a concise statement of the facts constituting the alleged violation and shall set forth the date, time and place of the hearing. Upon a finding of a violation of section 20-696, the commissioner shall be authorized to impose a civil penalty not to exceed five hundred dollars for each such violation.

§ 20-698. Scope. The provisions of this subchapter shall not be construed to curtail, limit or affect any of the powers, jurisdiction or authority of any federal, state, or local agency, nor in any way limit or affect any rights or remedies available under any other law.

§ 2. This local law shall take effect immediately.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

THE HERTZ CORPORATION,

Plaintiff,

- against -

THE CITY OF NEW YORK, O. PETER SHERWOOD, in his official capacity as Corporation Counsel of the City of New York, and MARK GREEN, in his official capacity as Commissioner of Consumer Affairs of the City of New York

Defendants.

----------x

VERIFIED COMPLAINT

Plaintiff The Hertz Corporation ("Hertz"), for its Verified Complaint herein, avers:

Nature of the Action

1. This is an action by Hertz for injunctive relief pursuant to Fed. R. Civ. P 65 restraining and enjoining defendants from enforcing a local law of the City of New York that was passed by the New York City Council as Int. No. 71-A on March 12, 1992 ("the Hertz Law") and for a declaratory judgment pursuant to 28 U.S.C. §§ 2201, 2202 declaring the Hertz Law invalid and unenforceable.

2. The Hertz Law, which prohibits rental vehicle companies from charging varying rates based upon place of

residence, compels a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and therefore is preempted and invalid under the Supremacy Clause of the United States Constitution, Article VI. Additionally, the Hertz Law forces Hertz, if it is to continue to do business in New York City, either to (a) continue to lose money in the New York area and to be deprived of a fair return on its investment, thereby effecting an unconstitutional taking under the Fourteenth Amendment; (b) impose a discriminatory charge on out-of-state renters who rent in the New York area, thereby violating the Commerce Clause of the United States Constitution, Article I, Section 8; or (c) raise its rental rates in other states, thereby violating the Commerce Clause of the United States Constitution, Article I, Section 8. For these same reasons, the Hertz, Law violates 42 U.S.C. § 1983. In any event, as applied to Hertz, the Hertz Law violates the Contract Clause of the United States Constitution, Article I, Section 10. The Hertz Law also violates the substantive Due Process provisions of the Fourteenth Amendment of the United States Constitution, and of Article I, Section 6, of the New York State Constitution. Finally, the Hertz Law is preempted by state law and therefore violates the New York State Constitution, Article IX, Section 2(c).

Jurisdiction

3. This Court has jurisdiction over all claims pursuant to 28 U.S.C. § 1332. In addition, the Court has jurisdiction over the first, second, third, fourth, fifth and sixth claims pursuant to 28 U.S.C. § 1331. The Court also has jurisdiction over the first claim pursuant to 28 U.S.C. § 1337 and over the sixth claim pursuant to 28 U.S.C. § 1343.

4. The amount in controversy exceeds $50,000 exclusive of interest and costs.

Parties

5. Plaintiff Hertz is a Delaware corporation with its principal place of business in the State of New Jersey. Hertz is engaged in the business of renting vehicles to the public and has rental offices throughout the United States and the world, including numerous locations in the Borough of Manhattan and at La Guardia and Kennedy Airports in the Borough of Queens.

6. Upon information and belief, defendant City of New York ("The City") is a municipal corporation organized under the laws of the State of New York, with the power to sue and be sued, pursuant to New York City Administrative Code § 2-101. The City is a citizen of the State of New York for purposes of 28 U.S.C. § 1332.

7. Upon information and belief, defendant O. Peter Sherwood is the Corporation Counsel of The City. The Hertz Law makes the Corporation Counsel responsible for its enforcement. The Charter for the City of New York, Section 394, also empowers the Corporation Counsel to institute actions to enforce the local laws of The City. Mr. Sherwood is sued only in his official capacity as Corporation Counsel.

8. Upon information and belief, defendant Mark Green is the Commissioner of Consumer Affairs for The City. Pursuant to the Hertz Law, the Commissioner is empowered to hold hearings, to determine whether the Hertz Law was violated and to impose civil penalties for any such

violations. Mr. Green is sued only in his official capacity as the Commissioner of Consumer Affairs.

Summary of the Case: the Hertz Law

9. Upon information and belief, on March 12, 1992, the City Council passed Int. No. 71-A, which was approved by the Mayor of The City on March 27, 1992. This law amends Chapter Four of Title 20 of the Administrative Code of the City of New York by adding, inter alia, the following provision:

> "No rental vehicle company shall refuse to rent a motor vehicle to any person otherwise qualified based on that person's residence, nor impose fees or charges based on that person's residence."

In addition, the Hertz Law makes provision for civil penalties, including injunctive relief, for violations of that section.

10. Upon information and belief, the Hertz Law was passed as a response to an announcement made by Hertz on January 2, 1992, that it would increase its rental rates for residents of four New York boroughs (the Bronx, Brooklyn, Manhattan and Queens) who rent Hertz cars in the New York area ("the Residence Rates").

Hertz's Rate Increase

11. Hertz's Residence Rates were established solely for the purpose of apportioning to those groups that were

responsible for them the staggering losses that Hertz was suffering in the New York area as a result of "liability losses" (personal injury and property damage claims paid or reserved to be paid to third parties as well as associated costs such as administrative costs and attorneys fees). Specifically, although only about seven percent of Hertz's nationwide rentals occur in the New York area, more than 25 percent of its liability losses occurred in the New York area. Indeed, before increasing its prices to residents of the Bronx, Brooklyn, Manhattan and Queens, Hertz was actually losing money in the New York area when all of its operating costs, as well as its liability losses, were considered. In effect, renters who lived outside New York City were subsidizing the liability losses attributable to New York City residents.

12. Hertz increased its rates for residents of the Bronx, Brooklyn, Manhattan and Queens by the amount of the excess liability losses (rounded down to the nearest dollar) it experienced from rentals to those persons. Thus, Hertz's rates were increased by $56.00 per day for Bronx residents, $34.00 per day for Brooklyn residents, $3.00 per day for Manhattan residents, and $15.00 per day for Queens residents.

13. Hertz excluded several groups of renters from the increases. Certain renters were entitled to rental rates that were established by contracts between Hertz and their employers. This category includes corporate accounts and accounts with the United States government. Hertz also excluded certain categories of renters--renters possessing airline tickets, members of the "Manhattan Preferred Renters Club", and "Platinum Service" customers--shown by experience to be low risk groups. In addition, Hertz excluded members of the "Hertz Gold Club" since they do

not check in at a rental counter to rent a car and therefore could not practicably be notified of the increased rate. All of the excluded groups had lower average liability losses per rental day than did New York residence renters who rented in the New York area, but who did not belong to any excluded group. Finally, on March 11, 1992, Hertz announced the establishment of a "Responsible Renter Qualification Program". Under this program, persons who would otherwise be subject to Hertz's increased rates may apply for and receive an exemption if they meet certain qualifications, including a safe driving record.

14. After Hertz announced its new rates on January 2, 1992, certain officials of the governments of The City and of the State of New York voiced strong opposition. On January 17, 1992, The City and the State of New York filed a complaint against Hertz in New York Supreme Court, New York County, alleging that the rate increases violated state and local law because of their "disparate impact" on minorities. The complaint also alleged that the rate increases violated New York General Business Law § 396-z(11), contending, in effect, that this section regulates the rates charged by rental companies. Hertz served its answer on February 6, 1992 and served a motion for summary judgment on February 21, 1992. The lawsuit and the motion are still pending.

Irreparable Injury

15. Upon information and belief, defendants will seek to enforce the Hertz Law against Hertz.

16. The Hertz Law forces Hertz to do one of three things if it wishes to continue to do business in New York

City: (a) rescind its recent rate increase and thereby continue to absorb massive losses; (b) raise its rates for everyone, both in-state and out-of-state residents, renting in the New York area; or (c) raise its rates in other states to recoup the massive losses experienced in the New York area. Actual or threatened enforcement of the law will, unless enjoined, cause immediate, serious, substantial and irreparable injury to Hertz in the following respects, among others:

(a) If Hertz is forced to rescind its recent rental rate increase to comply with the Hertz Law, Hertz will continue to absorb massive liability losses in an indeterminate amount.

(b) If Hertz is forced to raise its rates for everyone renting in the New York area--even to customers whose loss experience otherwise calls for lower rates--Hertz will lose an immeasurable amount of business and goodwill.

(c) If Hertz is effectively forced to raise its rates in other states, it will be at a disadvantage in competing with companies that do not have outlets in the New York area and that therefore do not need to reflect the New York area's extraordinary liability losses in their rates. Thus, Hertz will lose an immeasurable amount of business to those competitors as well as the goodwill of its out-of-state residents.

(d) If Hertz is forced to change its current rates in order to comply with the Hertz Law, only to have the enforcement of the Hertz Law thereafter preliminarily enjoined, Hertz will, in addition to the above, suffer an unquantifiable amount of harm as a result of the disruption of its business and concomitant loss of goodwill.

Count I
(Federal Antitrust Preemption)

17. Hertz repeats and reavers each and every averment set forth in paragraphs 1 through 16 hereof.

18. Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, bans arrangements that interfere with the setting of prices by free market forces and makes such arrangements illegal per se.

19. The Hertz Law compels all rental vehicle companies operating in New York to refrain from pricing on the basis of their renters' places of residence and thereby mandates a per se violation of Section 1 of the Sherman Act.

20. Because the Hertz Law mandates a per se violation of Section 1 of the Sherman Act, it is preempted and therefore invalid under the Supremacy Clause of the United States Constitution, Article VI.

21. Hertz has no adequate remedy at law.

Count II
(Takings)

22. Hertz repeats and reavers each every averment set forth in paragraphs 1 through 16 and 18 through 21 hereof.

23. To the extent that the Hertz Law effectively forces Hertz to rescind its recent rental rate increases, the legislation will force it to continue to suffer a net operating loss and will deprive Hertz of the ability to make a fair

return on its investment, despite the fact that Hertz operates in an efficient manner.

24. The Hertz Law contains no mechanism or procedure by which a rental car company such as Hertz may be excused from the legislation's requirements, nor does it make provision for compensating Hertz.

25. By forcing Hertz to continue to lose money in the New York area and to fail to earn a fair return on its investment without compensation, the Hertz Law effects an unconstitutional taking from Hertz.

26. Hertz has no adequate remedy at law.

Count III
(Commerce Clause)

27. Hertz repeats and reavers each and every averment set forth in paragraphs 1 through 16, 18 through 21 and 23 through 26 hereof.

28. To the extent that the Hertz Law effectively forces Hertz to raise its rental rates to residents of other states, the legislation violates the Commerce Clause of the United States Constitution, Article I, Section 8.

(a) Many of those who rent from Hertz in the New York area are residents of other states and countries. Hertz's loss experience with respect to those renters is much lower than its loss experience for renters who reside in the Bronx, Brooklyn, Manhattan and Queens. As a result, Hertz charges out-of-state renters renting in the New York area much less. To the extent that the Hertz Law effectively forces Hertz to raise its rates for

out-of-state residents who rent in the New York area, the legislation requires Hertz to charge out-of-state residents more than they would otherwise be required to pay in order to subsidize losses that are actually caused by renters who reside in the Bronx, Brooklyn, Manhattan and Queens. This discrimination in favor of in-state residents violates the Commerce Clause;

(b) To the extent that the Hertz Law effectively forces Hertz to raise its rental rates in other regions of the country, instead of in New York, the legislation still violates the Commerce Clause. In that case, the Hertz Law would be controlling the rental rates plaintiff charges in other states and thereby imposing both a direct restraint and an undue burden on commerce in violation of the Commerce Clause.

29. Hertz has no adequate remedy at law.

Count IV
(Contract Clause)

30. Hertz repeats and reavers each and every averment set forth in paragraphs 1 through 16, 18 through 21, 23 through 26 and 28 through 29 hereof.

31. Application of the Hertz Law to rental contracts between Hertz and its customers that existed at the time the Hertz Law became effective will effectively impair the parties' rights and obligations in connection with these contracts.

32. The legislation neither purports to respond to an emergency or important public need, nor does any such

condition exist to which the legislation could be tailored; it does not protect a broad or basic societal interest; it appears to be completely unreasonable; and the legislation is unlimited in scope and duration.

33. Consequently, as applied to Hertz's pre-existing contracts with its customers, the Hertz Law violates the Contract Clause of the United States Constitution, Article I, Section 10.

34. Hertz has no adequate remedy at law.

Count V
(Due Process)

35. Hertz repeats and reavers each and every averment set forth in paragraphs 1 through 16, 18 through 21, 23 through 26, 28 through 29 and 31 through 34 hereof.

36. The Hertz Law does not reasonably advance any legitimate goal of The City. As a result, it violates Hertz's rights under the substantive Due Process provisions of the Fourteenth Amendment of the United States Constitution, and of Article I, Section 6, of the New York State Constitution.

37. Hertz has no adequate remedy at law.

Count VI
(Section 1983)

38. Hertz repeats and reavers each and every averment set forth in paragraphs 1 through 16, 18 through 21, 23 through 26, 28 through 29, 31 through 34 and 36 through 37 hereof.

39. 42 U.S.C. § 1983 makes liable in "an action at law, suit in equity or other proper proceeding for redress" every person who "under color of any statute, ordinance, regulation, custom, or usage, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution". 42 U.S.C. § 1983.

40. Application of the Hertz Law to Hertz violates Hertz's constitutional rights and therefore would deprive Hertz of "rights, privileges, or immunities secured by the Constitution" within the meaning of § 1983. Enforcement of the Hertz Law by the Corporation Counsel or by the Commissioner of Consumer Affairs of the City of New York or their assigns would constitute action under "color of any statute, ordinance, regulation, custom, or usage" within the meaning of § 1983. Consequently, enforcement of the Hertz Law by the Corporation Counsel, the Commissioner of Consumer Affairs, or their assigns would violate the provisions of § 1983.

41. Hertz has no adequate remedy at law.

Count VII
(Preemption Under State Law)

42. Hertz repeats and reavers each and every averment set forth in paragraphs 1 through 16, 18 through 21, 23 through 26, 28 through 29, 31 through 34, 36 through 37 and 39 through 41 hereof.

43. Rental car companies are already subject to comprehensive state legislation. See New York General

Business Law § 396-z, § 391-g, § 391-i, and § 398-b. These regulations clearly evince an intent on the part of the State to occupy the field with respect to all aspects of the relationship between the renter and the rental car company.

44. The Hertz Law also regulates this relationship since it regulates the prices that rental car companies may charge.

45. Since the State Legislature intended to occupy the entire field, the Hertz Law is preempted by state regulation. Thus, it violates the New York State Constitution, Article IX, Section 2(c) and is therefore null and void.

46. Hertz has no adequate remedy at law.

WHEREFORE, Hertz respectfully requests the Court to grant the following relief:

(a) a judgment declaring the Hertz Law null and void on the ground that it violates both the United States Constitution and the New York State Constitution;

(b) injunctive relief enjoining the defendants, temporarily, preliminarily and permanently from taking any action whatsoever to invoke, enforce, or apply the Hertz Law, or any orders, rules or regulations issued pursuant thereto, in any forum;

(c) an order awarding Hertz its costs, including reasonable attorneys fees; and

(d) such other and further relief as this Court may deem just and proper.

March 27, 1992.

CRAVATH, SWAINE, & MOORE,

/s/ Paul C. Saunders (PS-0587)
A member of the firm

Attorneys for Plaintiff
The Hertz Corporation,
Worldwide Plaza,
825 Eighth Avenue,
New York, N.Y. 10019
(212) 474-1000

VERIFICATION

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

PAUL M. TSCHIRHART, being duly sworn, deposes and says:

I am the Senior Vice President and General Counsel of The Hertz Corporation, plaintiff in the within action. I have read the foregoing Verified Complaint and know the contents thereof, and the same is true to my own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters I believe it to be true.

/s/ Paul M. Tschirhart

Sworn to before me this
27th day of March 1992.

/s/ Robert B. Zwillich
Notary Public, State of New York

No. 93-841

IN THE

Supreme Court Of The United States

October Term 1993

Supreme Court, U.S.
FILED
DEC 22 1993
OFFICE OF THE CLERK

THE CITY OF NEW YORK, *et al.*,

Petitioners,

v.

THE HERTZ CORPORATION,

Respondent.

ON PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

BEST AVAILABLE COPY

PAUL C. SAUNDERS*
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

JOHN J. CALANDRA
SUJA A. THOMAS
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for Respondent

**Counsel of Record*

December 22, 1993.

35 pp

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Second Circuit was correct in determining that New York City's so-called "Hertz Law" may be preempted by the Sherman Act because it eliminates one aspect of competition between horizontal competitors but does not constitute a wholly "unilateral" restraint on competition?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

Pursuant to Supreme Court Rule 29.1, respondent The Hertz Corporation identifies the parent companies and non-wholly owned subsidiaries of The Hertz Corporation as follows:

AB Volvo
Axus Luxembourg S.A.
Axus S.A.
Commerzbank Aktiengesellschaft
Ford Motor Company
Hertz Equipment Rental (France) S.A.
Leascar S.A.
Locaplan S.A.
Park Ridge Limited Partnership
United Truck Leasing, Inc. (Minnesota)

TABLE OF CONTENTS

Page

Table of Authorities iv

Summary of the Argument 3

Argument 3

I. THE SECOND CIRCUIT'S DETERMINATION THAT THE HERTZ LAW IS SUBJECT TO SCRUTINY UNDER SECTION 1 OF THE SHERMAN ACT WAS IN COMPLETE HARMONY WITH THE PRECEDENTS OF THIS COURT AND WITH THOSE OF OTHER COURTS 3

A. The Second Circuit Properly Applied the Precedents of This Court 3

B. The Decision Below Was Not in Conflict with the Decisions of Other Courts 11

II. IT IS PREMATURE TO REVIEW THE SECOND CIRCUIT'S DECISION 14

Conclusion 15

Appendix:

A. Transcript of district court conference RA1

TABLE OF AUTHORITIES

Cases	Page(s)
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) . . .	*passim*
Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)	6
Englert v. City of McKeesport, 872 F.2d 1144 (3d Cir.), *cert. denied*, 493 U.S. 851 (1989) . . .	11, 13, 14
Fisher v. City of Berkeley, 475 U.S. 260 (1986)	*passim*
Hertz Corp. v. City of New York, 1 F.3d 121 (2d Cir. 1993)	*passim*
Land v. Dollar, 330 U.S. 731 (1947)	14
Miller v. Hedlund, 813 F.2d 1344 (9th Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988) . . .	10, 11, 12
Municipal Utils. Bd. v. Alabama Power Co., 934 F.2d 1493 (11th Cir. 1991)	11, 12, 13, 14
Penn v. City of San Diego, 233 Cal. Rptr. 514 (Ct. App. 1987)	14
Rice v. Norman Williams Co., 458 U.S. 654 (1982)	10
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951)	*passim*
Schwegmann Giant Super Markets v. Edwards, 552 So.2d 1241 (La. Ct. App. 1989), *writ denied*, 556 So.2d 1280 (La. 1990), *cert. denied*, 496 U.S. 938 (1990)	11, 13, 14
324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987)	*passim*

Cases	Page(s)
Traffic Jam & Snug, Inc. v. Michigan Liquor Control Comm'n, 716 F. Supp. 1024 (E.D. Mich. 1989), *aff'd*, 899 F.2d 15 (6th Cir. 1990)	14
United States v. General Motors Corp., 323 U.S. 373 (1945)	14

Statutes and Rules

15 U.S.C. § 1 (Supp. 1993)	*passim*
N.Y.C. Local Law, Int. No. 71-A, § 1, 1-A Proceedings of the Council of the City of New York 838 (1992)	*passim*

Other Authorities

1 Phillip E. Areeda & Donald F. Turner, *Antitrust Law* ¶ 209 (1978)	4
Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 209 (Supp. 1992)	4, 6, 7, 8

IN THE

Supreme Court Of The United States

October Term 1993

THE CITY OF NEW YORK, et al.,

Petitioners,

v.

THE HERTZ CORPORATION,

Respondent.

ON PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

On March 12, 1992, the New York City Council passed a law prohibiting car rental companies from imposing "fees or charges" based on the residence of the renter [hereinafter "Hertz Law"]. *See* N.Y.C. Local Law, Int. No. 71-A, § 1, 1-A Proceedings of the Council of the City of New York 838 (1992), reprinted in its entirety at A43-44; JA49, 274.[1] The Hertz Law was passed in response to respondent The Hertz Corporation's ("Hertz") January 1992 decision to charge different and increased rates to the residents of four New York boroughs who rent cars in New York

---

[1] References to a number preceded by an "A" are to the appendix to the petition for a writ of certiorari. References to a number preceded by "JA" are to the joint appendix filed in the Second Circuit.

City and surrounding areas. *See* Report for the City Council Committee on Consumer Affairs, at JA291-92.[2]

Hertz challenged the Hertz Law, arguing, among other things, that it was preempted by the Sherman Act. (*See* A45-59.) The district court dismissed the complaint, but enjoined the City from putting the Hertz Law into effect pending appeal. (*See* A25-26.) The Second Circuit reversed, holding that the Hertz Law would in fact be preempted by Section 1 of the Sherman Act, 15 U.S.C. § 1 (Supp. 1993), unless it passed a rule-of-reason inquiry and remanded the case to the district court for further proceedings. *See Hertz Corp. v. City of New York*, 1 F.3d 121, 125-31 (2d Cir. 1993).[3] The district court has continued the injunction pending further order. *See* Transcript of district court conference, attached hereto as Appendix A, at RA12-13.

---

[2] In the preceding three-year period, Hertz lost about $70 million in the New York City region, due in part to New York's vicarious liability law. (*See* JA27-30, 36.) After an extensive study, Hertz calculated the new rate by aggregating the total liability losses from renters who reside in the different boroughs and then by dividing the loss figures by the total rental volume for each borough, measured in rental days. This calculation produced the liability losses per rental day for each area. The "normal" loss rate (defined as the loss rate attributable to residents of Staten Island and non-city residents) was subtracted, yielding "excess" loss that was attributable to renters living in the four boroughs as follows: $56.44 for Bronx residents, $34.10 for Brooklyn residents, $3.80 for Manhattan residents and $15.47 for Queens residents. Hertz then increased its rental rates by those amounts (rounded down to the nearest dollar). (*See* JA327-32.) It is not the case, as petitioners assert, that Hertz could have achieved the same result by increasing its rates for all New York Region rentals—including rentals to out-of-state residents—by $3.29 per day. (*See* Petition for Writ of Certiorari [hereinafter "Cert. Pet."] at 6.) The car rental business is competitive and there was no evidence that Hertz could have raised its rates for all renters without losing an unacceptably high amount of business. (*See* JA44-45.)

[3] The Second Circuit also reinstated Hertz's claim that the Hertz Law violates the Commerce Clause of the United States Constitution. *See Hertz*, 1 F.3d at 131-32. The opinion of the Second Circuit in *Hertz Corp. v. City of New York* is reprinted in its entirety at A1-24.

SUMMARY OF THE ARGUMENT

The Second Circuit correctly determined that the Hertz Law might be preempted by the Sherman Act and its opinion reflected a straightforward application of established Supreme Court precedent. Moreover, there is no conflict with the decisions of other circuits and other courts. Consistent with well-established precedent, the Hertz Law may be subject to preemption by the Sherman Act and is not exempted from preemption as a "unilateral" restraint since the government does not set the price to be charged or review the reasonableness of the prices charged. Further, it is premature to review the Second Circuit's decision because the case must be remanded to the district court for additional proceedings even if the Court grants the petition.

ARGUMENT

I. THE SECOND CIRCUIT'S DETERMINATION THAT THE HERTZ LAW IS SUBJECT TO SCRUTINY UNDER SECTION 1 OF THE SHERMAN ACT WAS IN COMPLETE HARMONY WITH THE PRECEDENTS OF THIS COURT AND WITH THOSE OF OTHER COURTS.

A. The Second Circuit Properly Applied the Precedents of This Court.

The Second Circuit determined that the Hertz Law restrained competition between horizontal competitors and that it did not constitute a "unilateral restraint" of the type that would have exempted it from antitrust scrutiny. *See Hertz*, 1 F.3d at 125-27.

It is unnecessary for this Court to review the Second Circuit's opinion because its determination that this law was subject to antitrust scrutiny was correct and in full harmony with this Court's decisions in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Fisher v. City of Berkeley*, 475 U.S. 260 (1986); and *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987). Those decisions make clear that, subject to the exception discussed below, no state or municipality

not otherwise immune may enact, as New York City has done here, legislation that limits price competition between horizontal competitors. Any attempt to do so would be preempted by and in violation of the Sherman Act. *See, e.g., Schwegmann*, 341 U.S. at 386-87, 389 (statute prohibiting liquor retailers from charging less than a specified price is invalidated because it "compels retailers to follow a parallel price policy" and therefore "demands private conduct which the Sherman Act forbids"); *Midcal*, 445 U.S. at 99-100, 103 (statute requiring liquor wholesalers to charge retailers the same price that was posted is invalidated because it "destroys horizontal competition"); *see also* 1 Phillip E. Areeda & Donald F. Turner, *Antitrust Law* ¶ 209 (1978); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 209.1a (Supp. 1992). Statutes that limit price competition are said to be preempted by Section 1 of the Sherman Act since they authorize or compel private parties to engage in "anticompetitive behavior". *See 324 Liquor*, 479 U.S. at 345 n.8. Municipalities may not enact such legislation.

As the Second Circuit correctly concluded, the Hertz Law is subject to antitrust scrutiny because it restrains horizontal competitors—Hertz and the other car rental companies—from engaging in residence-based price competition. *See Hertz*, 1 F.3d at 125. Petitioners do not challenge the Second Circuit's finding in that regard. The sole question that petitioners raise is whether the Second Circuit should have found that the Hertz Law is saved from preemption on the ground that it is a "unilateral restraint". We submit that there is no reason for the Court to review that question, since this Court's decisions clearly compel the conclusion that the Hertz Law is not such a wholly "unilateral" restraint but is rather a "hybrid" restraint, subject to antitrust scrutiny.

Fisher, the case on which petitioners primarily rely, involved a claim that a rent control ordinance was preempted by Section 1 of the Sherman Act. *See* 475 U.S. at 265-67. This Court upheld the rent control ordinance even though it compelled anticompetitive behavior because it involved "unilateral action outside the purview of § 1". *See id.* at 266-70. However, *Fisher* did not undermine the preemption rule articulated in the Court's

two earlier decisions, *Schwegmann* and *Midcal*; indeed, the *Fisher* Court reaffirmed that rule. *Fisher* stated that those two cases involved statutes that were "hybrid" restraints, that is, statutes that do not involve wholly "unilateral" action like the restraint in *Fisher*. *See id.* at 267-69. Thus, *Fisher* simply represents an application of the preemption rule to a specific fact situation in which, unlike here, the municipality set the maximum price that could be charged and reviewed its reasonableness, leaving no room for the market participants to become involved in the pricing mechanism. *See id.* at 262, 269.

Nevertheless, petitioners argue that the Hertz Law is like the rent control ordinance in *Fisher* because "it does not authorize discretionary anticompetitive conduct by private parties" but instead "merely forbids using an automobile renter's residence as a basis for charging additional rental fees". (Cert. Pet. at 14.) However, it is precisely because the Hertz Law eliminates one aspect of price competition—competition based on residence—but does not provide that the government set and review the prices to be charged, that it is a "hybrid" law subject to antitrust scrutiny.[4]

Schwegmann, *Midcal*, and *324 Liquor*, the three cases on which we principally rely, make it clear that a statute that regulates prices—either by authorizing or mandating that certain prices be charged or not charged—is a "hybrid" restraint unless it provides that the government set the mandated price and review the reasonableness of the price set. It is this "involvement of [private parties] in setting those prices [that] ma[kes] it impossible to characterize the regulation as unilateral action by the State". *See Fisher*, 475 U.S. at 268 (discussing *Schwegmann*).

In articulating the distinction between "hybrid" and "unilateral" restraints, the Court in *Fisher* discussed the statutes that were struck down in *Schwegmann* and *Midcal* in language similar to that used by the Second Circuit below. *Compare Fisher*, 475 U.S. at 267-69 with *Hertz*, 1 F.3d at 126-27. The

---

[4] Car rental companies in New York do in fact compete on the basis of residence-based pricing. (*See* JA317.)

Schwegmann statute allowed distributors to stipulate the minimum price at which goods could be sold at retail. *See Schwegmann*, 341 U.S. at 386-87. Once the distributor so stipulated and any one retailer agreed to abide by the price,[5] the Louisiana statute required that all other retailers—even the non-consenting retailers—abide by the price restrictions. *See id.* at 387.

The *Schwegmann* statute was a "hybrid" statute subject to Sherman Act scrutiny because the involvement of private parties "in setting those prices made it impossible to characterize the regulation as unilateral action by the State of Louisiana". *Fisher*, 475 U.S. at 268.

The *Midcal* statute required wine producers to set prices that wholesalers would charge to retailers. *See Midcal*, 445 U.S. at 99. If a wine producer did not set the prices, the statute required wholesalers to post the wholesale price for that producer's brands. *See id.* No wholesaler could sell wine to a retailer at other than those prices. *See id.* The *Midcal* Court invalidated that statute because it curtailed the ability of competitors—wholesalers in this case—to compete on prices. *See Midcal*, 445 U.S. at 103. The statute

> "destroys horizontal competition as effectively as if wholesalers 'formed a combination and endeavored to establish the same restrictions . . . by agreement with each other'".

Id. (quoting *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911)).[6]

---

[5] When *Schwegmann* was decided, the price-fixing agreement itself was authorized by the since-repealed Miller-Tydings Act. *See Fisher*, 475 U.S. at 268.

[6] Professors Areeda and Hovenkamp have observed that

> "the California statute was preempted by federal antitrust law, and the reason was clear: it brought about the same marketplace result as illegal resale price maintenance agreements. Suppliers were not only authorized to specify retail prices, they were compelled to do so. Dealers were not only permitted to comply with the supplier's specification, they also were

The *Fisher* Court likened the *Midcal* statute to the one in *Schwegmann*, stating that the "trade restraint condemned in *Midcal* entailed a similar degree of free participation by private economic actors" since, under the *Midcal* ordinance:

> "'The State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers.'"

Fisher, 475 U.S. at 268-69 (quoting *Midcal*, 445 U.S. at 100). In contrast to the statutes involved in those cases, the Berkeley rent control ordinance

> "places complete control over maximum rent levels exclusively in the hands of the Rent Stabilization Board. Not just the controls themselves but also the rent ceilings they mandate have been unilaterally imposed on the landlords by the city."

Fisher, 475 U.S. at 269.

Thus, what made the *Schwegmann* and *Midcal* statutes "hybrids" and the *Fisher* rent control ordinance "unilateral" was the fact that the *Fisher* statute provided that the government set the mandated price and review its reasonableness; the *Schwegmann* and *Midcal* statutes did neither. That indeed is the key distinction between the two. Professors Areeda and Hovenkamp have explained that

> "the key to understanding *Fisher* and to reconciling it with the earlier cases is to identify the factor that made the earlier preemption-notwithstanding-nonagreement cases 'hybrids.' This is readily done. The *Fisher* Court itself characterized the

---

compelled to do so. Furthermore, dealer compliance was enforced not merely by the supplier's ability to terminate non-complying dealers but by public authorities as well. With results so inconsistent with those mandated by the Sherman Act—results that, in the absence of the state statute, could ordinarily be obtained only through agreements violating the Sherman Act—the Supreme Court had no difficulty holding that the statute was preempted."

Areeda & Hovenkamp, *supra*, at 96.

> hybrid cases as ones in which the preempted state laws 'granted' private actors "'a degree of private regulatory power.'" The vice of the state regime in *Midcal* was that *California "'has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers.'" By contrast, the presence of genuine public control over rental prices is what saved the Berkeley ordinance from preemption.*"

Areeda & Hovenkamp, *supra*, ¶ 209.1c, at 101 (footnotes omitted) (emphasis added).[7]

In *324 Liquor*, a case decided a year after *Fisher*, the Court struck down another "hybrid" statute as preempted by Section 1 of the Sherman Act. *See 324 Liquor*, 479 U.S. at 335, 343, 352. That statute prohibited retailers from pricing their products below 112% of the wholesaler's posted price. *See id.* at 337. As in *Midcal* and *Schwegmann*, that statute was a "hybrid" statute subject to antitrust scrutiny because while it prohibited retailers from charging certain prices—below 112% of the wholesaler's posted price—it did not provide that the government actually set the mandated minimum price and review the reasonableness of the prices set by the retailers. *See id.* at 345 & n.8.

---

[7] The Court in *Fisher* did not impose a requirement that there be an "agreement" to find preemption under Section 1 of the Sherman Act. As Professors Areeda and Hovenkamp have explained:

> "Although the Court [in *Fisher*] thus seemed to hold that an illegal agreement was a prerequisite to preemption, it did not do so, for it readily reaffirmed the preemptions found in *Schwegmann* and *Midcal*. In those cases, it will be recalled, the states had also acted unilaterally and there were no private agreements. The Court squared its apparent requirement of an agreement with those cases by characterizing them as 'hybrid' situations. Hence, the key to understanding *Fisher* and to reconciling it with the earlier cases is to identify the factor that made the earlier preemption-notwithstanding-nonagreement cases 'hybrids.'"

Areeda & Hovenkamp, *supra*, ¶ 209.1c, at 101 (footnotes omitted).

The Second Circuit applied those precedents and properly

> "conclud[ed] that the Hertz law [was] not a 'unilateral' restraint. . . . because it removes one element of competition in car-rental pricing, but does not further regulate or review the prices set by rental companies."

Hertz, 1 F.3d at 127.

That holding was unquestionably correct. The Hertz Law mandates that car rental companies must charge the same price to residents of one borough that they charge to residents of another borough. However, the car rental companies, not the City, will determine what the mandated price will be, and there is no provision for the City to review the prices that are set. Thus, like the statutes at issue in *Midcal*, *Schwegmann*, and *324 Liquor*, the Hertz Law regulates the prices that may be charged but does not provide that the government set the mandated prices nor provide for governmental review of their reasonableness. The City "'has no direct control over . . . prices, and it does not review the reasonableness of the prices set'". *Fisher*, 475 U.S. at 269 (quoting *Midcal*, 445 U.S. at 100). Consequently, the Hertz Law is a "hybrid" restraint and therefore does not "constitute unilateral action outside the purview of § 1". *See Fisher*, 475 U.S. at 267. The involvement of the car rental companies "in setting those prices mak[es] it impossible to characterize the regulation as unilateral action" by the City of New York. *See id.* at 268.

In fact, the Hertz Law imposes a restraint that is very similar to the one found to be a "hybrid" restraint in *Midcal*. As we have noted, the statute at issue in *Midcal* required that wholesalers charge retailers the same prices that were set either by producers or by the wholesalers themselves. *See Midcal*, 445 U.S. at 99. Although the statute mandated that a certain price be charged, it did not provide that the government actually set the mandated price; that was left up to private parties. *See id.* at 100.

The statute involved here is very similar. The Hertz Law mandates that certain prices be charged—that is, the same price for residents of different boroughs—but, like the statute in *Midcal*, it does not set the actual price to be charged to those

residents. That is left up to the car rental companies, just as the statute in *Midcal* left up to the producers and/or wholesalers the actual prices that the wholesalers were required to charge retailers.[8]

Further, the Hertz Law is unlike the ordinance in *Fisher*, which not only mandated that certain prices not be charged, but also set the maximum prices and provided for review of those prices by the City's Rent Stabilization Board. *See Fisher*, 475 U.S. at 262, 267, 269. Here, by contrast, there is a mandated price that rental companies must charge—the same price for all New York City residents—but the City does not mandate what that price must be or review its reasonableness.[9] Thus, the Hertz

---

[8] That the *Midcal* statute gave producers the power to set the prices charged by *another entity* (*i.e.*, the wholesalers) is immaterial. To be sure, the Court in *Fisher* stated that a "hybrid" statute exists "[w]here private actors are. . . granted 'a degree of private regulatory power'", 475 U.S. at 268 (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 666 n.1 (1982) (Stevens, J., concurring)), but that meant that the "'State has no direct control over . . . prices, and it does not review the reasonableness of the prices set'", 475 U.S. at 269 (quoting *Midcal*, 445 U.S. at 100). So long as a private party, as opposed to the State, has "control" over the mandated prices, whether it is the party's own prices or not, the regulation is a "hybrid" restraint and cannot be said to "constitute unilateral action outside the purview of § 1". *See Fisher*, 475 U.S. at 267.

Petitioners acknowledge this point. In explaining why the statute in *Miller v. Hedlund*, 813 F.2d 1344, 1346-47 & n.1 (9th Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988), which required wholesalers to post their prices and then abide by them, was a "hybrid" restraint, the City stated that the statute "created an elaborate anticompetitive price maintenance structure and then let private actors use this anticompetitive framework *to fix their own prices*". (Cert. Pet. at 20 (emphasis added).)

[9] In explaining why the Hertz Law merits "hybrid" treatment, the Second Circuit stated that, unlike the rent control ordinance in *Fisher*, the Hertz Law "is not a 'pure regulatory scheme'" in which there is an "independent, quasi-judicial board that . . . could adjust rates and provide relief in individual circumstances". 1 F.3d at 127 (citation omitted). Petitioners argue that the Second Circuit should not have considered such factors, claiming that they "are not germane under *Fisher*". (Cert. Pet. at 22.) On the contrary, they are relevant in determining whether the statute provides for governmental "review [of] the reasonableness of the prices set". *See Fisher*, 475 U.S. at 269 (quoting *Midcal*, 445 U.S. at 100).

Law is plainly a "hybrid" restraint, and cannot be considered "unilateral action outside the purview of § 1". *See Fisher*, 475 U.S. at 267.

B. The Decision Below Was Not in Conflict with the Decisions of Other Courts.

Petitioners argue that the decision below "conflicts" with the decisions of other circuits and state courts. (*See* Cert. Pet. at 14, 17-23.) It does not.

Petitioners cite and discuss four cases: *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988); *Municipal Utils. Bd. v. Alabama Power Co.*, 934 F.2d 1493 (11th Cir. 1991); *Schwegmann Giant Super Markets v. Edwards*, 552 So.2d 1241 (La. Ct. App. 1989), *writ denied*, 556 So.2d 1280 (La. 1990), *cert. denied*, 496 U.S. 938 (1990); and *Englert v. City of McKeesport*, 872 F.2d 1144 (3d Cir.), *cert. denied*, 493 U.S. 851 (1989). None of those cases "conflicts" with the decision below. In fact, only one of them, *Miller*, involved a challenge to a statute that regulates prices.

Miller, which was decided after *Fisher*, involved a preemption challenge to an Oregon liquor pricing regulation that required wholesalers to post their prices in advance and then to adhere to those prices for a certain period of time. *See* 813 F.2d at 1346-47 & n.1. The Ninth Circuit concluded that, like the statutes in *Schwegmann* and *Midcal*, the Oregon statute compelled anticompetitive behavior. *See id.* at 1350-51.

> "If the wholesale beer and wine distributors had entered into a private agreement to accomplish what is otherwise required by the Oregon regulations, there is no question that a *per se* violation of Section 1 of the Sherman Act would be found."
>
> "While it is true that there is no agreement or concerted activity among the wholesalers, it can not be ignored that the challenged regulations facilitate the exchange of price information and require adherence to the publicly posted prices. In other words, the state compels activity that would otherwise be a *per se* violation of the Sherman Act."

813 F.2d at 1349.

The defendants in *Miller* argued that the statute could not be struck down because "the wholesalers merely act unilaterally in response to the requirements of the regulations". *Id.* at 1349. The Ninth Circuit rejected that argument. It concluded that the Oregon regulations were "hybrid" restraints, in reasoning remarkably similar to the Second Circuit's below. The *Miller* court stated that

> "Schwegmann and Midcal show that Oregon's actions are not unilateral. The regulations constitute a 'hybrid' restraint because, as in those two cases, Oregon *allows private parties to set the prices and does not review the reasonableness of those prices.*"

Id. at 1351 (emphasis added).

Like the Hertz Law, the *Miller* statute was found to be a "hybrid" precisely because it mandated that a certain price be charged—the price posted by the wholesaler—but did not provide that the government fix the mandated price or review its reasonableness. *See id.* at 1351. The decision below is clearly consistent with *Miller.*

The other cases cited by petitioners are similarly not in conflict with the Second Circuit's decision. In fact, since they did not involve statutes that regulate prices, those cases did not even consider what was necessary for a pricing regulation to be a "hybrid" restraint, much less reach a result contrary to the Second Circuit's holding.

Alabama Power involved facial challenges to two state statutes that specified what territories electrical providers could serve. *See* 934 F.2d at 1497, 1501. The statutes were defended on the ground that even if the statutes were anticompetitive, there was "state action immunity". *See id.* at 1501-05. The Eleventh Circuit, in a classic and correct articulation of the state action immunity doctrine, stated that the statutes were immune from attack if the statutes: (1) "w[ere] implemented pursuant to a clearly articulated state policy restraining competition; and (2) the policy was actively supervised by the state". 934 F.2d at 1501. Both prongs of that test were met with regard to the general

provisions of the statutes and those provisions of the statutes were upheld under the principle of state action immunity. *See id.* at 1502-05.

The court in *Alabama Power* did rely somewhat on *Fisher*'s analysis of "hybrid" restraints, but it did so as part of its analysis as to why the "supervision prong" of the immunity test was satisfied. *See* 934 F.2d at 1503.[10] That analysis lends nothing to petitioners' argument.

In *Edwards*, the Louisiana Court of Appeal upheld a statute requiring beer retailers to pay cash when purchasing from wholesalers. *See* 552 So.2d at 1243, 1248. Credit sales were prohibited. *See id.* at 1243. With regard to the preemption issue, the court upheld the statute on the ground of state action immunity. *See* 552 S.2d at 1244-45. While the *Edwards* court discussed *Fisher*'s "hybrid" rationale, that discussion was again limited solely to a determination of the immunity issue, and adds nothing here. *See id.* at 1245.

Englert involved a city resolution that made one company the only company authorized to make the electrical inspections required to obtain occupancy permits from the city. *See* 872 F.2d at 1146. There was no claim of preemption in *Englert*. Instead, the plaintiff alleged that the defendant city, by passing the resolution and the defendant inspection company, in performing thereunder, had entered into an agreement that violated Section 1 of the Sherman Act. *See id.* at 1145, 1151. The court, citing

---

[10] Contrary to petitioners' claim that *Fisher* treated the immunity and "unilateral" restraint issues as one and the same, *see* Cert. Pet. at 18 n.7, *Fisher* made it clear that they were not.

> "Because . . . the rent controls established by Berkeley's Ordinance lack the element of concerted action needed before they can be characterized as a *per se* violation of § 1 of the Sherman Act, we cannot say that the Ordinance is facially inconsistent with the federal antitrust laws. *We therefore need not address whether, even if the controls were to mandate § 1 violations, they would be exempt under the state-action doctrine from antitrust scrutiny.*"

475 U.S. at 270 (citations omitted) (emphasis added).

Fisher, found the proof insufficient to establish the necessary agreement. *See id.* at 1152. "[T]here were no activities indicating unlawful concerted action in violation of the Sherman Act". *Id.*[11]

Thus, petitioners' contentions notwithstanding, there is clearly no "conflict" between the decision of the Second Circuit and that of any other court. The Hertz Law is not a wholly "unilateral" restraint on competition since it regulates prices to a degree but does not provide for the government to set the prices or review their reasonableness. Consequently, it is a "hybrid" restraint, subject to a preemption challenge under Section 1 of the Sherman Act.

II. IT IS PREMATURE TO REVIEW THE SECOND CIRCUIT'S DECISION.

It has long been the practice of the Court not to review non-final judgments such as the one here unless such a review is "'fundamental to the further conduct of the case'". *See Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945)). Here, no matter what this Court does, the case will be remanded to the district court. Even if this Court should grant the petition and reverse the Second Circuit on the antitrust claim, the district court must still hear the Commerce Clause claim. Thus, there is no compelling reason for a review now. Even if the Court believes that the Second Circuit was wrong, it would be far more efficient and appropriate, we submit, to review its rulings after a full record has been made in a *nisi prius* court. Only four days elapsed between the filing of the complaint and the appeal on which the

---

[11] Petitioners also cite *Penn v. City of San Diego*, 233 Cal. Rptr. 514, 517 n.3 (Ct. App. 1987), and *Traffic Jam & Snug, Inc. v. Michigan Liquor Control Comm'n*, 716 F. Supp. 1024, 1026 (E.D. Mich. 1989), *aff'd*, 899 F.2d 15 (6th Cir. 1990). Neither case adds anything to their argument. *Penn* involved a San Diego ordinance, like the one upheld in *Fisher*, that set the maximum hourly price charged to card players. *See* 233 Cal. Rptr. at 517 n.3. The statute in *Traffic Jam*, like the statutes in *Alabama Power* and *Edwards*, was upheld on the ground of state action immunity and also did not involve price setting. *See* 716 F. Supp. at 1025, 1028.

petition is based. There has been no discovery; indeed the complaint has not even been answered. This petition is premature.

CONCLUSION

For the reasons stated above, respondent The Hertz Corporation submits that the petition for a writ of certiorari to review the decision of the Second Circuit should be denied.[12]

December 22, 1993.

Respectfully submitted,

PAUL C. SAUNDERS*
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

JOHN J. CALANDRA
SUJA A. THOMAS
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for Respondent

**Counsel of Record*

---

[12] Should the petition be granted, we are filing herewith a cross-petition for a writ of certiorari so that this Court could address the question whether the Second Circuit should have found that the Hertz Law was subject to a *per se* analysis, rather than subject to a rule-of-reason analysis, and if not, whether the standards for the rule-of-reason analysis were correctly stated.

APPENDIX A

TRANSCRIPT OF DISTRICT COURT CONFERENCE

SEPTEMBER 8, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE HERTZ CORPORATION	§	92 Civ. 2192 (WK)
	§	
Plaintiff,	§	
-against-	§	
	§	
THE CITY OF NEW YORK,	§	
O. PETER SHERWOOD, and	§	
MARK GREEN,	§	
	§	
Defendants.	§	

September 8, 1993
3:30 p.m.

Before:

HON. WHITMAN KNAPP,

District Judge

APPEARANCES

CRAVATH, SWAINE & MOORE
Attorney for plaintiff
by: PAUL C. SAUNDERS
JOHN CALANDRA

THE CORPORATION COUNSEL OF
THE CITY OF NEW YORK
Attorney for defendant
by: LORNA G. GOODMAN

(In Chambers)

THE COURT: I believe this is an application by the City for placing a bond.

MS. GOODMAN: We have a problem here, your Honor, and I would just like to recap for the record what happened here. Hertz enacted this rate schedule. The City Council then enacted a law which made the rates schedule illegal. Hertz then came into this court and challenged it on a number of grounds. Your Honor granted our motion to dismiss, but because there was one issue which in your opinion was up in the air a bit, which was the preemption issue, you gave them under 62(c) of the Federal Rules of Civil Procedure an injunction pending appeal.

The order said the injunction was in force pending the outcome of the appeal or until the Court of Appeals shall have modified or vacated this order. I think we all anticipated that the Court of Appeals, just as Mr. Saunders pointed out, would decide this definitively. In fact, as you know, they didn't decide it definitively. But they didn't say Hertz wins or the City wins. What they said is we can't dismiss this on the face of it. We have to go back and have a trial.

It's our position that when that appeal was completed and the mandate was entered that your injunction expired, was no more. The words of it were "pending the outcome of the appeal."

I think that that has to be the right interpretation of that injunction, because the injunction was granted for purposes of them obtaining a decision on this iffy issue. If the injunction were maintained now it would be maintained in light of a totally different underlying situation.

What we have now is a direction from the Second Circuit to go to trial on a very specific factual issue, the anti-competitive nature of this enactment on the one hand, and on the other hand, the evil to be prevented, the burden on minorities and the working poor of having this kind of rate structure. The commerce clause has to do with extraterritorial effect which the Second Circuit has given us a road map of the things we have to prove, and they have to prove before your Honor. Given that situation, I don't

think that the injunction which you issued has anything at all to do with the situation which is now before us, and I think that if Hertz wishes to have an injunction they should make a motion and show how they will prevail or how they have a likelihood of success and how they are irreparably injured.

Our position is the injunction is gone. We certainly will give Mr. Saunders time to make his motion for a new injunction, based on the facts which now exist, and that is our position.

MR. SAUNDERS: Your Honor, let me separate my remarks into two pieces. First, let me talk about the procedural aspects of this and then second, let me talk a little bit about the merits of the issue.

On the procedural issue we are in this posture. When we first came before your Honor, the very first time we saw you, I think we sat in this room, and it was the very same day on which the City Council had passed the so-called Hertz Law and within minutes afterwards we filed the action that we filed in this court and then we came to see your Honor that afternoon.

We were concerned that unless something were done to preserve the status quo the City law might become effective, thereby either requiring Hertz to lower its rates and to incur a loss, which we had demonstrated in the papers that we filed before you that the rates that were imposed by Hertz were imposed in order to offset losses that Hertz was incurring, and we were also concerned that if the law were in effect while this case was pending before your Honor, and then later in the Court of Appeals, there would be great confusion. Even if the City said they were not going to enforce the law —

THE COURT: They haven't said that.

MR. SAUNDERS: They haven't said that, but even if they said they weren't going to enforce the law there would be great confusion in the marketplace because I could envision a situation in which a customer would come to the Hertz counter with a copy of the law in his hand and say, "You can't charge me this extra rate." Even if the City Consumer Affairs Commissioner was not going to enforce it the customer would have the law in his hand

and say the rate is illegal and so forth. So there would really be chaos on the one hand. And on the other hand, Hertz would clearly suffer losses in the interim period for which it could never be compensated or recompensed.

So we had the hearing before your Honor on the merits of the case three or four days later. Your Honor during that time made it clear that, I think, perceptively as it turned out that one way or another this case was going to be decided by the Second Circuit, and that the best thing that you could do for the parties would be to get the case to the Second Circuit as quickly as possible.

THE COURT: Off-the-record.

(Off-the-record discussion)

THE COURT: On the record.

MR. SAUNDERS: In this case you may remember that there was a videotape of the argument so it would be hard for anyone to say that you didn't fully consider this, because I think the argument lasted for more than an hour as I recall.

In any event, what your Honor did was to deem the City's opposition to our motion for a preliminary injunction, which was before your Honor to be a motion to dismiss, and you granted that motion to dismiss, but you also entered an injunction with the proviso that we perfected an expedited appeal which we did.

The words of the injunction were important because of the particular posture in which the law was at that time. Under the law of the State of New York the Hertz Law did not become effective when the mayor signed it, which he did about a half hour before we saw you that afternoon. Instead, there was a ministerial procedure that requires ordinarily two or three days that needed to be followed in order to render the law.

THE COURT: I enjoined that procedure.

MR. SAUNDERS: You did enjoin that procedure, precisely so. I think at the moment that you entered that injunction the copy of the signed law was sitting on the desk of the Corporation Counsel, and I think that the procedures were that he, in the

ordinary course, would have then transmitted that signed law back to the City Council which would have in turn filed it with the Secretary of State in Albany, and once the law was transmitted from the City Council to the Secretary of State in Albany then it becomes effective. That whole procedure was enjoined. So as far as I know the signed law is still sitting on the corporation counsel's desk.

What has happened in the meantime is after you entered that injunction and after we perfected our expedited appeal, the City then moved in the Second Circuit to vacate the injunction, or at least to modify it so that it would expire on the date of the oral argument, and I well remember that day, because I'm not sure whether I actually even charged my client for appearing in court that day, as my recollection is that I never even got to say a word in the argument in the Second Circuit on the motion to vacate the injunction because I think I seem to recall that I was instructed by one of the judges, and I don't remember who, perhaps Judge Van Graafeilland, to sit there and not say a word.

MS. GOODMAN: However, it was not decided from the bench.

MR. SAUNDERS: Believe me it was decided from the bench. They didn't render the opinion that same minute, but it was decided from the bench.

In any event, the Second Circuit denied that motion. Then in due course after the argument on the merits in the Second Circuit, the Second Circuit certified to the New York State Court of Appeals the state preemption question which the State Court of Appeals after hearing argument on then returned to the Second Circuit with an opinion saying that the Hertz Law was not preempted by the New York State Automobile Renters Law and other New York State statutes. Then the Second circuit rendered its opinion.

THE COURT: Did it have intervening argument?

MR. SAUNDERS: The first argument was on the merits in the Second Circuit. Then there was an argument in the New York Court of Appeals.

THE COURT: Was there another argument in the Second Circuit?

MR. SAUNDERS: Because the case was fully argued the first time there was no other argument in the Second Circuit. I think the case was returned, or that one issue was returned to the Second Circuit from the New York State Court of Appeals probably in December or January. That is my recollection.

In August of this year, the Second Circuit rendered its opinion with which your Honor is familiar in this case and basically what the Second Circuit did is to remand the case to this court for consideration of two issues, one being the antitrust preemption issue and the second being commerce clause issue.

One of the questions that Second Circuit asked the City when the City moved to vacate your Honor's injunction is whether the City would pay Hertz if it turned out that the law was ultimately invalidated. That is, would the City make Hertz whole if the injunction were vacated.

THE COURT: This is while you were enjoying keeping your mouth shut.

MR. SAUNDERS: That's why I was enjoying keeping my mouth shut. The City's counsel, I think it was Ms. Goodman, said the City would not.

MS. GOODMAN: Absolutely I said it would not.

MR. SAUNDERS: That if Hertz lost money because of the imposition of a law ultimately determined to be unconstitutional, so be it.

The position we are in is this, the law is still not in effect. The republic has not crumbled in the last —

THE COURT: It's teetering though.

MR. SAUNDERS: It's teetering, but I think it could be seriously questioned whether the absence of the Hertz Law has caused the republic to teeter from time to time. I'm not aware that anybody who wishes to rent a car has not been able to rent a car, and I'm not aware that anyone who does not wish to pay Hertz's rates has

been forced or compelled to pay Hertz's rates. There are many, many alternatives available to those who wish to rent cars. I can think of a half a dozen other car rental companies that have not raised their rates the way Hertz did, and that are presumably enjoying banner business.

In any event, nobody is really being hurt by the fact that the law has not been put into effect. On the other hand, if the law is put into effect, even if the City says we are not going to enforce it, the law will be in effect and there will be absolute chaos at the rental counters because the law will be in effect, and the renters will be able to go to the rental counter and say, "You're not allowed to charge me that rate. The City law says you can't do it."

If it should ultimately be determined, as I believe it will, that the Hertz Law will be found invalid and unconstitutional, then Hertz will have suffered an injury during that interim period for which it can never be recompensed, at least as I haven't been able to figure out how to bring a personal action against the City officials who knowingly put into place an unconstitutional law in the teeth of the Second Circuit opinion, but in any event, I think Hertz would be out during that period. I can't think of a way that Hertz would be recompensed during that period.

Moreover, it the body politic would have endured a period during which there was an unconstitutional law on the books during the very same time when the constutionality of the law was being challenged, so nobody is being hurt, in my view, during the period before the law is put into effect, because I believe the law will be ultimately found unconstitutional anyway. Whereas if the law were put into effect there would be serious and irreparable, by Ms. Goodman's own words, damage to Hertz.

The position we are in is this. The City has told us that they wish to file a petition for certiorari in the Supreme Court. They have also told us, and I don't wish to speak for them and they can speak for themselves, that what they would like your Honor to do is to stay all the proceedings in this case while that petition is being heard in the Supreme Court.

THE COURT: That makes sense.

MR. SAUNDERS: But at the same time, I don't remember whether you told me that or whether Peter [Sherwood] told me that.

MS. GOODMAN: I didn't tell you that.

THE COURT: Told you what?

MR. SAUNDERS: Told me what I just said about staying the proceedings in the District Court. He did tell me that but if you have a different position, so be it. That's perfectly acceptable to us so long as the law is not in effect in the meantime. If the law is in effect in the meantime, then, that is, if your Honor should conclude that the law should be put into effect that would be a major serious problem for us. The relatively minor procedural issue is this. It's an interesting but relatively minor issue, because we are all here before you.

There was a question after the Second Circuit opinion was rendered whether your Honor's injunction was still in effect or whether it was automatically vacated by the actions of the Second Circuit. As Ms. Goodman said, your Honor's injunction said that it was in effect pending appeal.

MS. GOODMAN: Or until the Court of Appeals modifies or vacates.

MR. SAUNDERS: Which the Court of Appeals did not do. So the question was whether the action of the Court of Appeals automatically vacated the injunction.

Our preliminary view was, my instinctive view was, that it was still in effect, that this was your Honor's order, that the Second Circuit did not vacate it. It was asked to vacate it once before, it didn't vacate it. There is nothing in the opinion suggesting that the injunction was vacated. That is still your order.

THE COURT: On the contrary, the Court of Appeals said that I denied your motion, but granted your injunction, and you

appealed and she did not cross appeal, so that suggests to me that they think my injunction is still in effect.

MR. SAUNDERS: I think, although this is —

THE COURT: The words are not exact.

MR. SAUNDERS: I think that's exactly right. We did a little legal research and did find a case in which the [N]inth [C]ircuit, which we cited to Ms. Goodman, in a case in which the appellant lost on the merits with the District Court had entered an injunction similar to your Honor's where it was clear that that injunction remained in effect until the District Court then vacated the injunction, but that was a case in which the appellant lost, but the injunction was still in effect until the District Court vacated.

In any event, the City when we discussed this issue and cited this case to them, I think they took the position that that case was probably an outl[i]er case but it was the only case that we found. In any event, after we discussed that issue with the City their view was that the injunction was automatically vacated. Ours was that it wasn't. But they said, and I applaud them for it, they said that they would not do anything, that they would not take any steps to render the law effective, that is, they would not change the status quo until we had an opportunity to appear before you.

I think, if I hear what Ms. Goodman is saying, that we should make a motion to continue the injunction, we say, they should make a motion to vacate the injunction. I don't know that it really matters very much who goes first, because they have represented to us, and I assume it is still your position, that you are not going to do anything until Judge Knapp decides what to do.

THE COURT: It seems to me I can assume that both such motions are now before me, your motion to continue and her motion to vacate.

MR. SAUNDERS: That's fine.

MS. GOODMAN: Your Honor, I'd just like to say a few things. First of all, what we have here is a duly enacted statute by the City Council with the presumption of regularity. Obviously the City's not going to pay his business losses because of that statute.

Now we have a legal situation which is quite different from the one we had when your Honor issued the injunction.

THE COURT: Yes, I've been reversed.

MR. SAUNDERS: But not for issuing the injunction.

MS. GOODMAN: But Hertz did not win anything on the merits. Hertz survived a motion to dismiss and has been sent back for trial. So what we were talking about then was an injunction which would have lasted six, eight, ten weeks. As it was it lasted a year and a half about, but it was in a much different context than what we have here now.

What we have here now is the proposition that the legitimate wishes of the elected officials of the people of the City of New York, for years they can't have their law.

THE COURT: The elected officials' feelings are clearly hurt, but whether or not that's irreparable damage, I'm not sure. My feeling is that you have never suggested to me any damage that the City or anybody else is suffering by the existence of this memorandum, aside from your hurt feelings.

MS. GOODMAN: That's true, your Honor, but with all due respect it's not for us to show irreparable harm, just because we're not hurt —

THE COURT: I, the judge, have declared that I see no irreparable harm. Therefore if you want to change my mind it is up to you.

MS. GOODMAN: I accept your finding and I would agree that the City has suffered no irreparable harm.

THE COURT: The finding I made before is that no human being anywhere is hurt by this injunction of mine. I have heard nothing to suggest that that finding is wrong.

MS. GOODMAN: No, and I wouldn't argue that that finding is wrong. What I would argue though is that they have made any showing whatsoever that they are going to succeed on the merits. And there are two prongs to every injunction. They must make a showing on the merits, and they must show irreparable harm.

THE COURT: There is more showing they are going to succeed on their merits now than there was when I granted the injunction.

MS. GOODMAN: I disagree.

THE COURT: I said on the record that I thought the federal questions were frivolous and yet I granted the injunction. Now I have to eat crow. They are not frivolous. Their federal questions were viable questions which require a trial. Therefore, their request for an injunction is stronger now than it was when I granted it.

MS. GOODMAN: With all due respect, your Honor, I think that while there are viable questions they are questions of fact. They are not questions of law, and there is nothing on the record to show that they have a higher likelihood to succeed on the merits before your Honor in a plenary trial. There is nothing on the record before you to give you any supposition that they might have some likelihood of success on the merits, and I submit the standard in the Second Circuit is likelihood of success on the merits and irreparable harm. It's not my irreparable harm. I admit I have no irreparable harm and I even admit he has some harm, but he has no —

THE COURT: But when there is absolutely no harm reparable or irreparable to you, you have not shown me any injury reparable or irreparable that could be done to an human being as the result of this injunction. I have several times asked you to suggest a harm that anybody suffered by the existence of this and you haven't come up with any.

MS. GOODMAN: I agree that there is no harm to any given individual that we know of. However, there is harm to the public.

THE COURT: How is the public hurt?

MS. GOODMAN: Because when its officials enact a statute, and the court doesn't say that the statute is illegal. It says it might be given certain facts, but those facts are not here.

THE COURT: The court says the statute cannot be put into effect, and I don't know what conceivable harm any human being,

and the public is a congregation of human beings, and if no single one of them is hurt then the group hasn't been hurt.

MS. GOODMAN: Your Honor, people in the Bronx may be hurt.

THE COURT: Just tell me how?

MS. GOODMAN: Because they might want to rent a car and the only car rental place open at LaGuardia might be Hertz.

THE COURT: Has it ever happened?

MS. GOODMAN: I don't know.

THE COURT: I can tell you it has never happened.

MS. GOODMAN: I don't know how many rental car outlets there are in LaGuardia.

MR. SAUNDERS: There are no Hertz offices in the Bronx. There are at least a half a dozen at LaGuardia and there are a half a dozen in Newark, and there are probably more at JFK.

MS. GOODMAN: Isn't it possible that someone from Riverdale would want to take advantage of some mileage they got on an airplane and they come to Hertz and they rent it, they've got a certificate, and Hertz says, "Sorry, you live in Riverdale."

THE COURT: It is conceivable but I've never heard of it happening.

MR. SAUNDERS: It pains me to say this, but they could go to Avis.

MS. GOODMAN: I won't tell your client you said that.

THE COURT: But that would be cruel and unusual punishment.

MR. SAUNDERS: Perhaps not legally reparable.

MS. GOODMAN: Your Honor, I think also as a matter of law that we are hurt, and I would ask permission to make a motion to vacate the injunction.

THE COURT: You made it and it is denied.

All proceedings will be stayed until November 1st or the decision of any petition that the City may file.

MS. GOODMAN: How long will the injunction be in effect? Until the Supreme Court rules?

THE COURT: The injunction will be in effect as long as this action is pending unless someone make a motion either before me or the Court of Appeals to vacate.

(3)

No. 93-841

Supreme Court, U.S.
FILED
DEC 21 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

THE CITY OF NEW YORK,

Petitioners,

v.

THE HERTZ CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI.

ALBERT W. WALLIS*
Corporation Counsel
DAVID L. GALLOGLY
Special Assistant Corporation Counsel
City of Boston
One City Hall Square
Boston, Massachusetts 02201
(617) 635-4020

* Counsel of Record

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

BEST AVAILABLE COPY

No.

In the
Supreme Court of the United States

OCTOBER TERM, 1993

THE CITY OF NEW YORK,

Petitioners,

v.

THE HERTZ CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI.

Interest of the Amicus Curiae

This brief Amicus Curiae is filed pursuant to Rule 37 of the Rules of this Court on behalf of the City of Boston, Massachu-

setts (City) in support of a Petition for a Writ of Certiorari. The City asserts that the Court of Appeals' decision in this case will have significant impact on the City's ability to use its home rule powers to enact laws that affect the conduct of businesses within its boundaries. Accordingly, the focus of this brief is to apprise the Court of the nature of such impact.

Boston is the capital of Massachusetts and the largest city in New England. It has an economically and culturally diverse population of nearly 600,000 and on a daily basis an additional 500,000 people work in or visit the City. Additionally, millions of tourists visit the City annually and its renowned educational and medical institutions attract thousands more each year. *Boston Facts & Figures, 1990, Boston Municipal Research Bureau; Boston Transportation Department Progress Report, 1988.* Boston has the twelfth busiest airport in the country with more than 23 million passengers annually. *Final Generic Environmental Impact Report, Logan Airport, July 15, 1993.*

Cities and towns in Massachusetts have been given the right of self-government in local matters as well as rights concerning the conduct of their local government. These rights are embodied in the Massachusetts Constitution and are known as home rule powers. The Constitution of Massachusetts provides, in part, that "[a]ny city or town may, by adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter." Amended Article II, Section 6, Constitution of Massachusetts.

The City has used its home rule powers on many occasions to respond to specific problems affecting City residents and visitors. For example, in order to limit the adverse impacts

associated with construction activities in the City, an ordinance was adopted that restricts all such work to the hours of 7:00 A.M. to 6:00 P.M. on weekdays, except by special permit. Another ordinance controls and regulates street peddlers and hawkers by requiring them to be licensed, and one ordinance has banned the sale of certain types of canned spray paint and indelible markers to persons under 18 years of age to help combat the spread of graffiti.

On these and other occasions the City has enacted protections that respond to specific problems and benefit its citizenry. Each of these actions affects the conduct of businesses in the City, either by requiring them to conduct work only during specified hours or by barring sales to certain classes of persons. Although these enactments may have some economic impact on the regulated businesses and restrain competition to some degree, they are legislative determinations that should not result in judicial inquiries into how a particular local problem was addressed or remedied by local authorities. If left in place, the Court of Appeals' ruling in this case will do just that. On remand, the District Court has been directed to apply the rule-of-reason approach "to this emerging legal field" involving "a challenge to restraints on competition imposed by municipal activity." *Hertz Corporation* v. *City of New York*, 1 F.3d 121, 125 (2d Cir. 1993).

A judicial inquiry of this nature would usurp the local legislature's historical role in assessing local conditions and drafting legal remedies and insert the courts into areas properly left to those bodies. It could also subject municipalities to potentially costly and complex antitrust litigation. Accordingly, the rule-of-reason analysis under Section 1 of the Sherman Act should not be applied to the municipal enactment in this case, and the Court of Appeals' determination should be reviewed by this Court.

Pursuant to Rule 37.5 of the Rules of this Court, consent to the filing of this brief is waived due to the City's status as a political subdivision of the Commonwealth of Massachusetts and its filing by the City's authorized law officer.

Statement of the Case.

The statement of the case as set forth in the City of New York's Petition for a Writ of Certiorari is adopted by the City for purposes of this brief.

Reasons for Granting the Writ.

The City adopts the Reasons for Granting the Writ as presented by the City of New York in its Petition for a Writ of Certiorari and highlights the salient points.

The petition should be granted because the Court of Appeal erred when it concluded that New York City Local Law, Int. No. 71-A is a "hybrid" statute within the meaning described by this court in its decision in *Fisher* v. *City of Berkeley*, 475 U.S. 260 (1986). See Sup. Ct. R. 10.1(c). Int. No. 71-A simply prohibits motor vehicle rental companies from using residence as a basis for charging additional rental fees. It does not provide these companies with any discretionary authority to make their own anticompetitive decisions. Accordingly, Int. No. 71-A qualifies as a restraint imposed unilaterally by a governmental entity and is therefore not an agreement or conspiracy to restrain trade. Thus, Section 1 of the Sherman Act is wholly inapplicable.

Conclusion.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ALBERT W. WALLIS*
Corporation Counsel
DAVID L. GALLOGLY
Special Assistant Corporation Counsel
City of Boston
One City Hall Square
Boston, Massachusetts 02201
(617) 635-4020

* Counsel of Record

Supreme Court, U.S.
FILED
JAN 21 1994
OFFICE OF THE CLERK

No. 93-841

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

THE CITY OF NEW YORK, *et al.*,

Petitioners,

-against-

THE HERTZ CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

LEONARD J. KOERNER,*
LAWRENCE S. KAHN,
ALAN G. KRAMS,
of Counsel.

PAUL A. CROTTY
Corporation Counsel of the
City of New York
Attorney for Petitioners
100 Church Street
New York, New York 10007
(212) 788-1031 or 1010

January 21, 1994

*Counsel of Record

BEST AVAILABLE COPY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

THE CITY OF NEW YORK, *et al.*,

Petitioners,

-against-

THE HERTZ CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITIONERS' REPLY BRIEF

The fundamental flaw throughout Hertz's opposition brief is that it ignores the fact that the essential attribute of an impermissible hybrid restraint is governmental creation of an anticompetitive legal framework that is used by private actors to make or enforce their own anticompetitive decisions. Hertz avoids the fact that Int. No. 71-A creates no such framework by incorrectly analogizing the ordinance to statutes that provide legal cover for price-fixing decisions made by private parties, with no government supervision. *See, e.g.*, Brief for the Respondent in Opposition at 5 (hereinafter "Hertz Br.").

Relying on *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), and *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), Hertz makes the sweeping argument that any local regulation touching on price is an impermissible hybrid restraint unless "the government [sets] the mandated price and [reviews] the reasonableness of the price set." Hertz Br. at 5. While this might be an accurate statement regarding legislation that directly regulates the level of prices, even the Court of Appeals acknowledged that Int. No. 71-A is not "classic price-setting" such as was involved in *324 Liquor Corp.*, *Midcal*, and *Schwegmann*, and "does not purport to authorize price-setting by private industry." *Hertz Corp. v. City of New York*, 1 F.3d 121, 127 (2d Cir. 1993).

Contrary to Hertz's implication, *Midcal*, *Schwegmann*, and *324 Liquor Corp.* did not hold that government must regulate totally or not at all. The antitrust violation in those cases was allowing private parties to set prices that government then fixed for them through statutes and regulations. That was also the flaw in the regulatory scheme in *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988). The common element in those cases is that the offending statutes and regulations improperly allowed private concerns "to maintain retail prices at artificially high levels." *324 Liquor*, 479 U.S. at 340.

Int. No. 71-A is a directive to businesses, not an authorization for businesses to make anticompetitive decisions of their own. Private businesses do not "[make] the operative decisions regarding the challenged anticompetitive conduct."

Municipal Utilities Bd. of Albertville v. Alabama Power Co., 934 F.2d 1493, 1503 (11th Cir. 1991). In Int. No. 71-A, the "challenged anticompetitive conduct," prohibition of residence-based pricing, is imposed unilaterally by the ordinance itself, a point acknowledged by the Court of Appeals when it called the ordinance "simply a directive for all rental-car companies doing business in New York City to remove one factor from their competitive-pricing structure." *Hertz Corp.*, 1 F.3d at 127. The fact that the ordinance does not include total government control over prices is simply not significant, and the Court of Appeals erred when it applied this element of the unilateral/hybrid test for price control legislation to an enactment involving a concededly different economic restraint.

Hertz tries to avoid the conflict between the reasoning of the Court of Appeals in this case and the incompatible holdings in *Alabama Power*, quoted above, and *Schwegmann Giant Super Markets v. Edwards*, 552 So. 2d 1241 (La. App. 1989), *writ denied*, 556 So. 2d 1280 (La.), *cert. denied*, 496 U.S. 938 (1990), Petition for Certiorari at 18, by disparaging *Alabama Power* and *Edwards* as state action immunity decisions that addressed unilateral vs. hybrid restraints merely as part of a discussion of the active supervision portion of the state action immunity test. *See* Hertz Br. at 13. As explained in the petition, this characterization does nothing to detract from the force of the holdings in those cases. *See* Petition for Writ of Certiorari at 18 n. 7.[1]

---

[1]Hertz incorrectly claims that petitioners are maintaining that *Fisher v. City of Berkeley*, 475 U.S. 260 (1987), treated state action immunity and the unilateral vs. hybrid distinction as identical questions. *See* Hertz Br.

(continued...)

Nor should the absence of finality deter this Court from granting the petition. The antitrust claim addressed in the petition is the only cause of action in Hertz's complaint that was upheld by the Court of Appeals.[2] A writ of certiorari is warranted now because the issue presented is a pure question of law that will not be sharpened by a factual record, *see Michael v. United States*, 454 U.S. 950, 951 (1981) (White, J., dissenting), and ultimate reversal of the Court of Appeals by this Court would render meaningless the District Court proceedings contemplated by the Court of Appeals. In short, the question presented by the petition warrants review both because it raises an important issue of antitrust law and is "fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *accord Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n. 3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n. 2 (1947). As petitioners and amicus, the City of Boston, have explained, left unreviewed pending further

---

[1](...continued)
at 13 n. 10. Petitioners made no such claim. What petitioners did say is that *Fisher* used principles first articulated in state action immunity cases to explain the difference between unilateral and hybrid restraints, and, therefore, cases discussing the adequacy of government supervision in state action immunity cases are relevant to the question of whether governmental action is unilateral or hybrid. *See* Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L. J. 486, 506-08 (1987).

[2]Hertz says that its Commerce Clause claim was "reinstated" by the Court of Appeals, Hertz Br. at 2 n. 3, but that claim, like all others except the antitrust claim, was found legally insufficient. *See Hertz Corp.*, 1 F.3d at 131-32. The Court of Appeals gave Hertz a second chance to plead a valid Commerce Clause claim only because it remanded the Sherman Act cause of action. *Id.* at 132.

proceedings, the Court of Appeals' decision will place a cloud over a host of municipal regulatory efforts never intended to be brought within the ambit of the antitrust laws. *See* Petition for Writ of Certiorari at 25-27; Brief in Support of Petition for a Writ of Certiorari at 2-3.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

PAUL A. CROTTY,
Corporation Counsel of the
City of New York,
Attorney for Petitioners.

LEONARD J. KOERNER,*
LAWRENCE S. KAHN,
ALAN G. KRAMS,

of Counsel.

*Counsel of Record